

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~3~~ 2

METLAKATLA INDIAN COMMUNITY, ANNETTE
ISLAND RESERVE, APPELLANT,

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

No. ~~3~~ 3

ORGANIZED VILLAGE OF KAKE, ET AL.,
APPELLANTS,

vs.

EGAN, GOVERNOR OF ALASKA.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

FILED AUGUST 20, 1959

JURISDICTION POSTPONED DECEMBER 7, 1959

Supreme Court of the United States

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE
ISLAND RESERVE, APPELLANT,

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

No. 327

ORGANIZED VILLAGE OF KAKE, ET AL.,
APPELLANTS,

vs.

EGAN, GOVERNOR OF ALASKA.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

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**IN THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU**

Civil Action File No. 8066-A

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,
a Federally Chartered Corporation, Plaintiff,

vs.

WILLIAM A. EGAN, Governor of the State of Alaska, and
THE STATE OF ALASKA, Defendants.

NOTICE OF APPEAL

I. Notice Is Hereby Given that the Metlakatla Indian Community, Annette Island Reserve, A Federally Chartered Corporation, Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court for the State of Alaska, Division Number One, Juneau, Alaska, entered July 2, 1959, dismissing the complaint filed by the Appellant.

This appeal is taken pursuant to 28 USC 1257 (1) and (2).

[fol. 2] II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint filed by Metlakatla Indian Community, Annette Island Reserve, with affidavits of William Coyne, Raymond V. Haldane, Henry J. Duncan, and Henry S. Littlefield attached.
2. Motion for Preliminary Injunction filed by Metlakatla Indian Community, Annette Island Reserve.

3. Motion to Dismiss Complaint filed by Appellee William A. Egan against Metlakatla Indian Community, Annette Island Reserve.
4. Affidavit of Walter Kirkness filed by Appellee, William A. Egan, in the consolidated companion cases of Kake and Angoon v. Egan, Nos. 8063-A and 8064-A, which affidavit was herein incorporated by stipulation in open Court.
5. Affidavits of Haakan Friele and Clarence D. Payne, filed by the Organized Villages of Kake and Angoon in the consolidated companion cases of those villages against Egan, No. 8063-A and 8064-A, which affidavits were herein incorporated by stipulation in open Court.
6. Brief of Appellant, Metlakatla Indian Community, Annette Island Reserve, filed in support of Complaint.
7. Brief of Appellee, William A. Egan, filed in support of Motion to Dismiss Complaint.
8. Affidavits of Alf Erickson, Neil Grant, Harold Martindale, William E. Smith, and Andy Wikan, filed by Appellee, William A. Egan, in the consolidated companion cases of Kake and Angoon v. Egan, Nos. 8063-A and 8064-A, which affidavits were herein incorporated by stipulation in open Court.
9. Reporter's transcript of proceedings of June 29, 1959, relating to assumption of jurisdiction by District Court as a State Court.
- [fol. 3] 10. Reporter's transcript of record of proceedings on July 1, 1959, containing Appellant's oral notice of appeal.
11. Opinion rendered by the Court on July 1, 1959.
12. Motion for preliminary injunction pending appeal filed by Metlakatla Indian Community, Annette Island Reserve.
13. Order of Court denying motion for injunction pending appeal.

14. Supplemental findings of fact entered by Court on July 2, 1959.
15. Judgment of dismissal of the complaint of Metlakatla Indian Community, Annette Island Reserve, entered July 2, 1959.

III. The following questions are presented by this appeal:

1. Is all authority to administer and manage the fish and wildlife resources of Alaska for the year 1959 reserved to the Federal Government by the terms of Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, so as to make the Alaska criminal statutes, 17 SLA 1959 as amended by 95 SLA 1959, unenforceable against the appellant by the State and its officials, and so as to make the regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing appellant to fish the trap sites therein designated a valid exercise of that authority?

2. If Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, does purport to reserve such control to the Federal Government and thereby render inapplicable the Alaska criminal statutes, does Section 6 (e) violate the "equal footing" doctrine governing the admission of new States to the Union?

3. Does the Alaska Statehood Act, 72 Stat. 339, in Section 4 thereof and in its adoption and ratification of the Alaska Constitution (in this instance specifically Article XII, Section 12 thereof) comprehend a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and if so, is Section 4 of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the State, and further are the [fol. 4] regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing Appellant to fish the trap sites therein designated a valid exercise of that authority?

4. If the Alaska Statehood Act does so comprehend a permanent disclaimer by the State of Alaska and a permanent assumption of jurisdiction by the Federal Government, does it violate the "equal footing" doctrine governing the admission of new States to the Union?

5. Is the Alaska Statehood Act Congressional action of such a type, solely by virtue of its passage, as held by the District Court, that would eliminate and abolish that portion of the Annette Island Reserve (3000 feet of water surrounding the Island Reserve and the tidelands underlying said waters) which was established by Act of Congress (48 USC 358) in 1891, and vest title thereto, and the ownership thereof, in the State of Alaska?

6. Does the Secretary of the Interior derive his power to authorize reservation wards to fish on their reservation with designated gear and designated locations pursuant to the provisions of the White Act (48 USC Section 221), as was held by the District Court, or does the Secretary of the Interior derive such powers from the Act of Congress establishing the Annette Island Reserve which entrusted to him the powers and duties of administering said wards (48 USC Section 358)?

7. Did the lower Court err in inferentially holding that the Annette Island Reserve was not "Indian country" as defined in 18 USC Section 1151, and that, therefore, the provisions of 18 USC Section 1162 (1) were not applicable to the State of Alaska, and (2) Alaska could control and regulate by means of criminal prosecution, the fishing of the Indian wards within the boundaries of the Annette Island Reserve?

....., Of Counsel for Metlakatla
Indian Community, Annette Island Reserve, Box
1079, Ketchikan, Appellant.

[fol. 5] Proof of Service (omitted in printing).

[fol. 6]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, for cause of action against defendants herein, alleges:

I

This is an action for injunctive relief brought pursuant to Rule 65 of the Federal Rules of Civil Procedure.

II

That plaintiff herein is a federally chartered corporation, organized and existing under the laws of the United States and is qualified to bring suit and to be sued in courts of competent jurisdiction.

[fol. 7] (a) The original Tsimpsean Indians migrated in 1886 from British Columbia to the site of the present day Metlakatla Indian Community, located on Annette Island, Alaska. The emigration and settlement of these peoples were not only acquiesced in, but encouraged by, executive and administrative officers of the United States. The Metlakatla Indian Community prospered in its reserve; native born Alaskan Indians joined the original settlers, acquiring all the right and privileges of the original emigrants. Today the town has a population of approximately 1,000 inhabitants. The townsite is divided into streets and alleys, blocks, and lots for residential and commercial purposes. Title to the structures thereon is vested in the individual owners thereof, but title in fee, not only to the townsite, but also to all the lands within the reservation are held in trust for the members of the Metlakatla Indian Community by the United States. There are churches, homes and

stores; in general, Metlakatla bears a resemblance to any other small town in Alaska. It owns and operates for the benefit of the community the Annette Island Canning Company, and its economy is based almost entirely upon its fishery resources.

[fol. 8] (b) By Act of Congress of March 3, 1891, (Title 48, U.S.C.A., Section 358), the present day Annette Island reserve was established. The Act provided as follows:

"Until otherwise provided by law, the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska on the North side of Dixon's Entrance, is set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlans, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

(c) On June 25, 1915, pursuant to the provisions of the Act creating the Annette Islands reserve, the Secretary of the Interior, for the first time, prescribed certain rules and regulations for the government of Metlakatla Indians and other Alaska Indians residing there.

(d) On February 11, 1915, the Secretary of the Interior ruled and ordered that permits could be issued to natives of Metlakatla to erect salmon traps on the shores of Annette Island, and for other purposes. The pertinent part of the order stated "That, until otherwise ordered by the Secretary of the Interior, natives or associations of natives of Metlakatla who [fol. 9] have secured the approval of the Council of the Annette Islands reserve be given permits by the Secretary of the Interior to erect salmon traps on the shores of Annette Island".

- (e) The Annette Islands reserve was increased to include the waters within three thousand (3000) feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets and also the bays of said Islands, rocks and islets. The inclusion of the waters to a distance of 3000 feet from the shore at mean low tide, as aforesaid, was accomplished by Presidential Proclamation No. 1332, signed and issued on April 28, 1916. The proclamation was issued by virtue of the authority contained in Title 43, U.S.C.A., Section 141. The reasons for thus including these waters, as stated in said proclamation, were that the Secretary of the Interior, in order to assist the Metlakatians to become self-supporting, had decided to place in operation a cannery on Annette Island, and that to preserve a supply of fish and other aquatic products for the cannery it was necessary to establish an exclusive fishery for the Metlakatians. To buttress the manifest intent of the President of the United States, the proclamation [fol. 10] added, "Warning is hereby given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."
- (f) The legal position has always been taken, since the reserve was created, that the traps and cannery are instrumentalities of the United States provided by the United States on the Annette Island reserve for the betterment of the Indian inhabitants thereof.
- (g) The relation of guardian and ward exists between the United States and the Metlakatla Indians; it is the duty of the United States to preserve and protect the rights of the Metlakatla Indians through the courts; the Secretary of the Interior, by virtue of the statute of March 3, 1891, as well as by virtue of his general supervisory power over the Indian people who are wards of the nation, is authorized to enact and promulgate such regulations and restrictions as may promote their welfare; the power thus

given the Secretary of the Interior was, and is, a continuing power.

(h) In 1953, Congress enacted Chapter 29, Title 43, U.S.C.A., the "Submerged Lands" Act, under the provisions of which, the several states were, generally speaking, vested with title and ownership to the lands beneath navigable waters within their respective boundaries. The Act contained two significant exceptions found in Section 1313, designated respectively [fol. 11] as (a) and (b):

(a) "all tracts or parcels of land together with accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under any claim of right.

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians;"

(i) The Alaskan Admission Act, Public Law 85-508, Section 4 thereof, provides:

"As a compact with the United States, said state and its people do agree and declare that they forever disclaim all right and title to any lands or other

property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives), or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and [fol. 12] remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation:"

It seems apparent that not only does the United States hold title in fee to the Annette Islands reserve, including the waters to a distance of 3000 feet from the shore at mean low tide, but it also further appears that the State of Alaska has forever specifically disclaimed all right and title to lands and property the right or title to which is held by the United States or is subject to disposition by the United States, or which lands or property are held by the United States in trust, as is the case here, for Indians, which trust includes an exclusive fishery for the Metlakatla Indians.

- (j) On March 7, 1959, by order found in Section 115.26, 24 Fed. Reg., page 2069, the Secretary of the Interior authorized the Metlakatla Indian Community to install and operate the hereinafter described traps at the designated locations for the 1959 salmon fishing season:
- (1) Annette No. 3, located at 55°02'47" North lat., 131°38'53" West long.
 - (2) Annette No. 4, located at 55°05'41" North lat., 131°19'31" West long.

(3) Annette No. 6, located at 55°00'45" North lat., 131°38'30" West long., and

(4) Annette No. 8, located at 55°10'13" North lat., 131°19'31" West long..

[fol. 13] The trap sites above enumerated are all wholly within the waters of the Annette Islands reserve, as created by the laws of the United States.

III

This action involves questions under the laws of the United States, including, but not necessarily limited to, those enumerated in Paragraph II hereof, and the laws of the State of Alaska, including, but not necessarily limited to, Chapters 17 and 94, SLA, 1959; the matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00 and diversity of citizenship exists between the parties; more important, a substantial federation question is hereby raised and herein presented.

IV

When the aforementioned order was issued by the Secretary of the Interior on March 7, 1959, plaintiff began preparing traps for installation at the designated trap sites. The approximate cost to plaintiff by the time the traps are ready for setting, to-wit: July 6, 1959, will be in excess of \$50,000.00. More than \$35,000.00 had been expended in pre-season preparatory work by plaintiff on its traps before the defendants advised plaintiff, on or about May 25, 1959, that the defendants intended to eliminate all fish traps from Alaskan waters, the laws of the United States and regulations of the Secretary of the Interior to the contrary notwithstanding. To curtail trap operations at this late date would result in an approximate loss to plaintiff, including moneys already disbursed, of almost \$64,500.00.

[fol. 14]

V

Plaintiff packed 68,700 cases of salmon in 1958, 25,763 cases of which were directly attributable to its trap-caught fish. The production cost of the seasonal operation was

\$1,022,387.79. The market value of the total 1958 pack, after selling expenses, was \$1,326,959.91. Sworn affidavits filed herewith and made a part hereof conclusively show that, had it not been for the supply of trap-caught fish, plaintiff's 1958 operation would have resulted in an approximate loss of \$65,279.88. The profit on the total pack for 1958 was \$253,106.38; without its trap-caught fish, plaintiff would have sustained a net loss in excess of \$318,000.00.

VI

Plaintiff derives almost all of its seasonal pack from trap-caught fish and fish caught by seine vessels. If the right of plaintiff to utilize its fish traps is abolished, the supply of fish for plaintiff's cannery will be eliminated or so substantially diminished as to imperil the operation thereof for 1959, and necessitate the abandonment thereof for subsequent years. The investment in trap gear and related equipment will be rendered useless for 1959, and will have little salvage value. The catch of seine vessels or other mobile gear is already fully utilized, and no substantial increase in catch from these sources can be expected with which to replace lost trap production.

VII

As is conclusively shown by sworn affidavits herewith filed, plaintiff, over the last seven years of its operations, could not have operated profitably without its trap-caught fish; indeed, had it not been for the supply of fish provided [fol. 15] by the Metlakatla traps in past years, the canning operation would have been abandoned by plaintiff before 1959.

VIII

The Metlakatla Indians are a seafaring people who have always turned to the sea for their livelihood. The economy of the community depends upon its annual fishing endeavor. If the cannery were to be prohibited from operating by the curtailment of its supply of trap-caught fish, members of the community who now make their only annual wages in the cannery would be impoverished. The seasonal can-

nery payroll, in excess of \$100,000.00, would be forever lost unto them. Moneys thus earned are spent during the winter months for food, clothing and other necessities of life. If these cannery wages were to be eliminated, there would be no other work available on the Annette Island reserve. The community would become economically dormant, its people would disperse, they would necessarily lose the self-supporting status they have achieved, public welfare rolls would swell, and the very purposes for which the Congress of the United States created the Annette Islands reserve would be circumvented and defeated.

IX

Plaintiff has pledged a substantial part of the earnings derived from its salmon cannery operation to the United States to retire loans aggregating almost \$1,800,000.00. Without trap caught fish, as aforesaid, the cannery cannot be operated profitably; hence, abolition of the plaintiff's traps will necessarily cause it to default on its loan obligations; these allegations are supported by sworn affidavits herewith filed and made a part hereof.

[fol. 16]

X

Chapters 17 and 94, SLA 1959, are unconstitutional and invalid in that they are in derogation of, and in direct conflict with, the applicable federal laws as set forth in Paragraph II hereof. Section 1 of Chapter 17, SLA 1959, provides for the imposition of fines and/or imprisonment upon those who violate the provisions of the Act. To violate the Act, all one has to do is "erect, moor or maintain fish traps, on or over lands or tidelands owned or hereafter acquired by the State of Alaska." Under the provisions of Chapter 94, SLA 1959, although, to the plaintiff's knowledge, such has not been done yet, the Board of Fish and Game has power to enact rules or regulations having the force of law, a violation of which would result in fines and/or imprisonment, as well as confiscation of plaintiff's gear.

XI

Defendants have threatened publicly, on several occasions, to invoke "the police power of the State" in order to eliminate fish traps and to prohibit their operation from and in the coastal waters of Alaska within the Annette Islands reserve; the defendant Governor of the State has also stated publicly, as recently as June 13, 1959, at Metlakatla, Alaska, that he was "sworn to uphold the constitution and laws of the State of Alaska" and that "the State Government would neither hesitate nor waver in its obligation to enforce the law." Defendants have likewise threatened to invade plaintiff's reservation to enforce State laws (see affidavits herewith filed and made a part hereof). These threats are not idle in nature, but have been made with deliberate intent and purpose. Prosecution is imminent and immediate, and, if these threats are carried out, plaintiff will sustain exceptional and irreparable injury [fol. 17] jury, if as a result thereof, use of its fish traps are prohibited or said traps are confiscated.

VII

Plaintiff is informed, fears and believes that defendants will seek to enforce the criminal provisions of Section 1 of Chapter 17, SLA 1959, or rules and regulations promulgated by the Board of Fish and Game pursuant to the provisions of Chapter 94, SLA 1959. Arrests of natives of other communities engaged in pre-season work on floating fish traps have already been made and one trap seized, as recently as June 17, 1959, and those natives are now awaiting arraignment and prosecution. Defendants at present have two vessels near trap sites at Kake and Angoon, both native villages in Southeastern Alaska, which vessels are manned by fully armed State Police. Defendants, unless restrained and enjoined from so doing, will carry out their threats to cause like arrests to be made of the plaintiff's members, and its traps, nets, gear, etc., confiscated, all of which would constitute grievous, immediate and irreparable loss and injury to plaintiff and its members; these allegations are supported by sworn affidavits filed herewith and made a part hereof.

VIII

Plaintiff has no plain, speedy and adequate remedy at law to challenge the constitutionality and validity of State laws for the reason that time is of the essence, and were the determination of the rights of the parties to be adjudicated on the basis of criminal prosecutions, both pending and threatened, the 1959 trap-caught fish would necessarily be lost irretrievably by the plaintiff. Furthermore, plaintiff would be without a speedy, plain and adequate [fol. 18] remedy of law in any event, inasmuch as State law prohibits an action against the State for damages if the claim for which damages are sought is predicated upon the acts of agents or employees of the State of Alaska, the doing of which acts has been exercised in the execution of State statutes or regulations, irrespective of the validity or invalidity thereof.

XIV

The action threatened by the defendants violates, and is repugnant to, the laws of the United States and the Constitution of the State of Alaska in that not only is the State attempting to encroach upon and eliminate federal instrumentalities, but it also threatens to act in violation of the following:

1. The laws of the United States of America prevent the State of Alaska, or any officer or agent thereof, from exercising any control over the supervision and management of the fish and wild life in Alaska at this time (see Section 6 (e) Statehood Act, 72 Stat. 339).
2. The laws of the United States of America (Section 4, Statehood Act, Section 4, 72 Stat. 339) and the Constitution of the State of Alaska (Article XII, Section 12) prevent the State of Alaska from interfering with the control and management of Indian fishing rights held either by Indians or held by the United States of America in trust for Indians, at any time, now or in the future.

3. The regulations issued by the Secretary of the Interior (24 Fed. Reg., 2053 et seq.), on March 7, 1959; allowing the plaintiff to operate and utilize four fish traps at the sites noted hereinabove constitute an exercise by the United States of its exclusive power both over the whole Alaska fisheries and over the fishing rights of Indians.
4. The Commerce Clause of the Constitution of the United States of America places the regulation of the social and economic welfare of Indians exclusively within the power of Congress of the United States, as well as that of the fish and wild life resources of the United States.
5. That the statute under which the defendants claim their authority (17 SLA 1959), the claim of Constitutional mandate (Ordinance No. 3), and the general claim of police power are all repugnant to the principles and laws above stated and therefore are in violation of the laws of the United States, the Constitution of Alaska, and the Constitution of the United States of America; they are, therefore, unconstitutional, invalid, void and of no force and effect.

XV

That in recent weeks public interest in the controversy has mounted. Isolated outbreaks of violence have already taken place and it is feared that if the situation is allowed to continue without a determination of the rights of the [fol. 20] parties immediately that violence will increase; especially is this true if the State officials adhere to their manifested and announced course of action to invade the plaintiff's reservation and to enforce invalid and unconstitutional State laws, rules and regulations. The public interest and welfare could best be served by an immediate hearing on the question of the aforementioned rights.

XVI

By way of recapitulation, and as hereinabove set forth, plaintiff is without a plain, speedy and adequate remedy at

law to have the constitutionality of defendants' acts determined; plaintiff contends that the laws of Alaska are unconstitutional and invalid as applied to it or its members, because of its reservation status and the applicable laws involved; plaintiff will suffer immediate, exceptional and irreparable loss, damage or injury if the defendants, their officials, agencies, employees and servants are not restrained and enjoined from trespassing on plaintiff's lands or waters, and restrained and enjoined from enforcing, or attempting to enforce, unconstitutional and invalid State laws.

Wherefore, Plaintiff prays that the Court herein issue a temporary restraining order restraining the defendants, their officials, agencies, employees and servants from committing any act of trespass upon plaintiff's reservation, held in trust for it and its members by the United States of America; that defendants, their officials, agencies, employees and servants be restrained from enforcing or [fol. 21] attempting to enforce any of the laws of the State of Alaska which allegedly gives the defendants the right so to invade plaintiff's reservation, and to arrest, fine and/or imprison, and confiscate; plaintiff further prays that defendants be ordered forthwith to appear before this Honorable Court to show cause, if any such there be, on a date to be fixed by this Court, why preliminary injunctions should not be issued against the defendants enjoining their officials, agencies, employees and servants from invading plaintiff's reservation, held for it and its members in trust by the United States of America, and enjoining defendants, their officials, agencies, employees and servants from enforcing, or attempting to enforce, unconstitutional and invalid State laws, rules or regulations; plaintiff further prays that upon trial of this cause the Court issue its permanent injunction enjoining the defendants, their officials, agencies, employees and servants from trespassing upon or invading plaintiff's reservation, held for it and its members in trust by the United States of America, and that the defendants, their officials, agencies, employees and servants be enjoined from enforcing or attempting to enforce, unconstitutional and invalid State laws, rules or regulations, or in anywise interfering with plaintiff's exclusive fishery rights.

Plaintiff further prays the Court that, as applied to it, Chapter 17, SLA 1959, Ordinance No. 3 of the Constitution of the State of Alaska and all other laws of the State of Alaska relied upon by defendants as authority for their interference with plaintiff's fishery rights, be adjudicated unconstitutional, invalid, void and of no force and effect.
 [fol. 22] Dated at Juneau, Alaska, this 23rd day of June, 1959.

Ziegler, Ziegler & Cloudy, Counsel for plaintiff.

Duly sworn to by Henry S. Littlefield, jurat omitted in printing.

[fol. 23]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF WILLIAM COYNE

State of Alaska)
 First Judicial Division) ss:

William Coyne, being first duly sworn, on oath, deposes and says as follows:

I am the Manager of the Annette Island Canning Company which is owned and operated by the Metlakatla Indian Community. I have served in this capacity since the late 1940's and am thoroughly familiar with the canning operation and its economy upon Metlakatla and the inhabitants thereof.

[fol. 24] As Manager of the Annette Island Canning Company, employed as such by the Council Annette Islands Reserve, and in connection with the 1959 operation, I did not follow my usual procedure of ordering trap supplies and equipment at the conclusion of the 1958 season, or in the subsequent winter months, because of the uncertain

condition of the status of fish traps. However, in early March of this year, the Secretary of the Interior authorized Metlakatla to fish four traps during the 1959 season, and pursuant to this order, I proceeded with pre-seasonal preparations. To date we have spent approximately \$50,000.00 of cannery funds in this work and by July 13, 1959, the date of the season opening, we will by then owe approximately another \$50,000.00 for a total of \$100,000.00. Undersecretary of the Interior, Elmer Bennett, advised the Area Director for the Bureau of Indian Affairs, under date of March 10, 1959, as follows:

"As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339), the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the long-standing supervisory control exercised for the protection of the interests of Indians, Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of the fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages.

The Angoon Community Association, the Organized Village of Kake, and the Metlakatla Indian Community, may proceed to make plans for operation of their salmon canneries in 1959 on the basis that they will be permitted to continue to operate the number of fish traps consistent with proper conservation practices recommended by this Department."

The canned salmon business in Alaska involves an unusually high percentage of fixed costs as compared to other industries in and out of Alaska. Even direct canning labor is a fixed item of cost; that is, it does not vary with volume of production. This is so because of the seasonal guarantees paid to most all workers. The guaranteed sum is the same, regardless of the hours worked or the number of cases

produced. Cans, cartons, and southbound shipping costs are the only major items of cost that vary directly with the volume produced.

In such a situation, the number of cases that can be put through a plant has a decided bearing on the per case production costs. In fact, the maintenance of high volume may be said to be the "key" to successful operation. The elimination of traps from the Annette operation would, of [fol. 25] course, reduce the potential volume of fish available for canning. The question here is what effect would the reduced volume have on the financial results of the operation, and that is answerable only by reference to prior year's results adjusted for an assumed elimination of trap volume.

The approach adopted in the accompanying analytical schedules is to start with the known results of prior years operations as recorded in financial statements audited by Ernst & Ernst, C.P.A.s. Then to eliminate the sales value, production costs, administrative expenses and the profit or loss attributable to cases of salmon produced from the trap catch. The remaining sales and costs after this elimination are then attributable to cases produced from the seine catch and the resulting profits or losses can be calculated.

The problem could also be solved by analyzing and classifying all expense items as to fixed and variable costs, and then apportioning the fixed costs to the smaller volume of seine catch alone. The same results would be obtained, but the figures and calculations would not be so readily traceable to the audited financial statements.

The accompanying schedules contain full details of the items attributable to trap case production, the elimination thereof, and the calculated results. It may, however, be helpful to point out and comment on a few of the major items:

1. The *net sales values* of trap cases is obtained by multiplying the known trap cases by specie by the average sales price by specie, and deducting the per case selling expenses multiplied by the known cases—see Schedule "B".

2. The *direct trap costs* are all eliminated—see Schedule “B”.
3. *Cans, cartons, salt and shipping costs* are eliminated on a direct per case basis (unit cost \times trap cases).
4. *Labor*—It is assumed that had traps not operated, the operation would have been cut to one line, eliminating 34 employees. Labor cost is, therefore, reduced by $34 \times$ the seasonal guarantee paid in each year.
5. The elimination for cannery overhead includes the depreciation on trap equipment, and the other smaller items detailed on schedule “C”. Except for depreciation, it was necessary to estimate the amounts involved.
6. The elimination from *administrative expense* includes association dues on an actual per case basis, and an estimate of interest savings resulting from less volume to finance.

[fol. 26] The eliminations for production costs attributable to trap case production are probably higher than actual. The labor elimination, for example, assumes elimination of one full line and does not allow for overtime in excess of guarantees that might result from canning on only one line. It is believed, therefore, that the losses from the hypothetical trap elimination are definitely not overstated and may possibly be understated.

The accompanying schedules include:

“A”—A summary of effect of trap production on operations—showing losses, increased costs, and a breakdown of the losses resulting from increased costs and from lost profits.

The total loss consists of the difference between the actual profit or loss and the calculated profit or loss had traps not operated. For example, in 1958 Metlakatla would have had a \$65,279.88 loss instead of the actual \$253,106.38 profit. So the total loss to Metlakatla would have been \$318,386.26.

"B"—A summary of the calculations, supports schedule A.

"C"—Detail of cost reductions that could be made if the traps were not operated. Supports various totals used in schedule B.

"D"—Pack and sales statistics, showing detailed calculation of the sales value of cases produced from trap fish. Supports schedule C.

It is my considered opinion that if Metlakatla is deprived of its trap-caught production, economic reality will compel, necessarily, the complete curtailment of the cannery operation at Metlakatla with these results:

1. The cannery buildings will deteriorate and be forever lost to Metlakatla.
2. The community will lose its primary and almost its sole source of income.
3. Metlakatla will be forced to default on its loan obligations.
4. The Metlakatla Indian Community will wither and die; it cannot exist without the cannery, and the [fol. 27] cannery cannot operate without enough fish to make the operation profitable; only by the utilization of traps will there be sufficient production to make the seasonal operation pay.

Dated at Ketchikan, Alaska, this 19th day of June, 1959.

William Coyne

Subscribed and sworn to before me this 19th day of June, 1959.

Ruth E. Brown, Notary Public for Alaska, My Commission expires: 9/18/60.

Schedule "A" to Affidavit

**SUMMARY OF
EFFECT OF TRAP PRODUCTION ON OPERATIONS**
Annette Islands Canning Co.

June 15, 1959

1952 - 1958

| | <u>1958</u> | <u>1957</u> | <u>1956</u> | <u>1955</u> | <u>1954</u> | <u>1953</u> | <u>1952</u> |
|--|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|----------------------|-----------------------|
| Net profit or (loss) that would have resulted if traps had not operated | (\$ 65,279.88) | (\$ 24,154.98) | (\$ 63,999.70) | (\$ 15,640.00) | \$ 55,907.06 | (\$124,049.18) | (\$194,865.57) |
| Actual profit or (loss) that resulted with traps | <u>253,106.38</u> | <u>34,478.03</u> | <u>106,496.85</u> | <u>10,990.44</u> | <u>347,803.09</u> | <u>(116,325.56)</u> | <u>(33,509.64)</u> |
| Total unrecovered overhead and profits that Metlakatla would have lost if traps had not operated | <u>(\$318,386.26)</u> | <u>(\$ 58,633.01)</u> | <u>(\$170,496.55)</u> | <u>(\$ 26,630.44)</u> | <u>(\$291,896.03)</u> | <u>(\$ 7,723.62)</u> | <u>(\$161,355.93)</u> |
| Packs - 48/1# Cases | | | | | | | |
| Trap | 25,763 | 8,308 | 13,845 | 5,793 | 22,390 | 10,051 | 19,327 |
| Seine | <u>42,937</u> | <u>45,030</u> | <u>49,627</u> | <u>31,095</u> | <u>52,547</u> | <u>39,932</u> | <u>26,806</u> |
| TOTAL | <u>68,700</u> | <u>53,338</u> | <u>63,472</u> | <u>36,888</u> | <u>74,937</u> | <u>49,983</u> | <u>46,133</u> |
| Increase in per case production costs without trap volume | <u>\$ 4.81</u> | <u>\$.78</u> | <u>\$ 2.55</u> | <u>\$.58</u> | <u>\$ 2.64</u> | <u>\$.09</u> | <u>5.33</u> |
| Increase in production costs without trap volume (seine cases x cost increase) | \$206,526.97 | \$ 35,123.40 | \$126,548.85 | \$ 18,035.10 | \$138,724.08 | \$ 3,593.88 | \$142,875.98 |
| Profit on sale of trap cases | <u>111,859.29</u> | <u>23,509.61</u> | <u>43,947.70</u> | <u>8,595.34</u> | <u>153,171.95</u> | <u>4,129.74</u> | <u>18,479.95</u> |
| TOTAL LOSS | <u>\$318,386.26</u> | <u>\$ 58,633.01</u> | <u>\$170,496.55</u> | <u>\$ 26,630.44</u> | <u>\$291,896.03</u> | <u>\$ 7,723.62</u> | <u>\$161,355.93</u> |

NOTES:

1. The two years 1954 and 1958 are considered good years. 1956 was a fair year. 1957 and 1955 were poor years, and 1952 and 1953 were loss years. This period is, therefore, representative of all conditions.
2. The increased volume provided by traps was highly effective both in increasing profits (see 1958) and in reducing losses (see 1952).

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ON OPERATIONS
Co.

| <u>1957</u> | <u>1956</u> | <u>1955</u> | <u>1954</u> | <u>1953</u> | <u>1952</u> | <u>Seven Year</u> | |
|------------------|-------------------|------------------|-------------------|----------------------|---------------------|-------------------|------------------|
| | | | | | | <u>Total</u> | <u>Average</u> |
| (\$ 24,154.98) | (\$ 63,999.70) | (\$ 15,640.00) | \$ 55,907.06 | (\$124,049.18) | (\$194,865.57) | (\$ 432,082.25) | (\$ 61,726.04) |
| <u>34,478.03</u> | <u>106,496.85</u> | <u>10,990.44</u> | <u>347,803.09</u> | <u>(116,325.56)</u> | <u>(33,509.64)</u> | <u>603,039.59</u> | <u>86,148.51</u> |
| (\$ 58,633.01) | (\$170,496.55) | (\$ 26,630.44) | (\$291.896.03) | (\$ 7,723.62) | (\$161,355.93) | (\$1,035,121.84) | (\$147,874.55) |
| 8,308 | 13,845 | 5,793 | 22,390 | 10,051 | 19,327 | 105,477 | 15,068 |
| <u>45,030</u> | <u>49,627</u> | <u>31,095</u> | <u>52,547</u> | <u>39,932</u> | <u>26,806</u> | <u>287,974</u> | <u>41,139</u> |
| <u>53,338</u> | <u>63,472</u> | <u>36,888</u> | <u>74,937</u> | <u>49,983</u> | <u>46,133</u> | <u>393,451</u> | <u>56,207</u> |
| <u>\$.78</u> | <u>\$ 2.55</u> | <u>\$.58</u> | <u>\$ 2.64</u> | <u>\$.09</u> | <u>5.33</u> | | |
| \$ 35,123.40 | \$126,548.85 | \$ 18,035.10 | \$138,724.08 | \$ 3,593.88 | \$142,875.98 | \$671,428.26 | \$ 95,918.32 |
| <u>23,509.61</u> | <u>43,947.70</u> | <u>8,595.34</u> | <u>153,171.95</u> | <u>4,129.74</u> | <u>18,479.95</u> | <u>363,693.58</u> | <u>51,956.23</u> |
| \$ 58,633.01 | \$170,496.55 | \$ 26,630.44 | \$291,896.03 | \$ 7,723.62 | \$161,355.93 | \$1,035,121.84 | \$147,874.55 |

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were poor years,
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ps was highly
e 1958) and

Schedule "B" to Affidavit
EFFECT OF TRAP PRODUCTION ON OPERATIONS
SUMMARY OF CALCULATIONS
Annette Islands Canning Co.

June 15, 1959

| | 1958 | 1957 | 1956 | 1955 | 1954 | 1953 | 1952 | Seven Year Total |
|--|-----------------|----------------|-----------------|----------------|-----------------|-----------------|-----------------|---------------------|
| Net sales less selling expenses | \$1,326,959.91 | \$1,043,898.70 | \$1,295,091.90 | \$ 756,321.92 | \$1,308,840.88 | \$ 720,163.28 | \$ 721,208.80 | \$7,172,485. |
| Less trap fish | 498,756.21 | 178,068.76 | 299,296.24 | 122,978.16 | 435,673.31 | 169,564.75 | 327,474.00 | 2,031,812. |
| | \$ 828,203.70 | \$ 865,829.94 | \$ 995,795.66 | \$ 633,342.76 | \$ 873,167.57 | \$ 550,598.53 | \$ 393,734.80 | \$5,140,672. |
| Production costs | \$1,022,387.79 | \$ 983,467.84 | \$1,161,455.23 | \$ 722,831.61 | \$ 935,422.67 | \$ 813,091.16 | \$ 734,219.91 | \$6,372,876. |
| Less cost reductions if no traps | 177,020.76 | 117,940.31 | 126,722.94 | 95,363.91 | \$ 141,090.48 | 159,931.44 | 164,571.91 | 982,641. |
| | \$ 845,367.03 | \$ 865,527.53 | \$1,034,732.29 | \$ 627,467.70 | \$ 794,332.19 | \$ 653,159.72 | \$ 569,648.00 | \$5,390,234. |
| Gross Profit (loss) if no traps | (\$ 17,163.33) | \$ 302.41 | (\$ 336,936.63) | \$ 5,875.06 | \$ 778,835.38 | (\$ 102,561.19) | (\$ 175,013.20) | (\$ 249,561. |
| Administrative expense, interest, etc. | \$ 51,465.74 | \$ 25,952.83 | \$ 27,130.92 | \$ 22,499.87 | \$ 25,615.12 | \$ 23,397.68 | \$ 20,498.53 | \$ 196,569. |
| Less cost reductions if no traps | 3,349.19 | 1,495.44 | 2,078.75 | 984.81 | 2,686.80 | 1,009.69 | 1,546.16 | 14,048. |
| | \$ 42,116.55 | \$ 24,457.39 | \$ 25,063.07 | \$ 21,515.06 | \$ 22,928.32 | \$ 21,487.99 | \$ 18,952.37 | \$ 182,520. |
| Net profit (loss) if no traps | (\$ 65,279.88) | (\$ 24,154.95) | (\$ 63,999.70) | (\$ 15,640.00) | \$ 55,907.06 | (\$ 124,049.18) | (\$ 194,855.57) | (\$ 432,082. |
| Net profit (loss) actual | 253,106.38 | 24,478.03 | 106,496.85 | 10,990.44 | 347,803.09 | (116,325.56) | (33,509.64) | 603,039. |
| Loss to Metlakatla | (\$ 318,386.26) | (\$ 58,633.01) | (\$ 170,496.55) | (\$ 26,630.44) | (\$ 291,896.03) | (\$ 7,723.62) | (\$ 161,355.93) | (\$1,035,121. |
| Pack | | | | | | | | |
| Production costs - Seine fish | \$ 845,387.03 | \$ 865,527.53 | \$1,034,732.29 | \$ 627,467.70 | \$ 794,332.19 | \$ 653,159.72 | \$ 569,648.00 | \$5,390,234. |
| Cost per case | 19.69 | 19.22 | 20.85 | 20.18 | 15.12 | 16.36 | 21.25 | |
| Production costs - Seine & Trap fish | \$1,022,387.79 | \$ 983,467.84 | \$1,161,455.23 | \$ 722,831.61 | \$ 935,422.67 | \$ 813,091.16 | \$ 734,219.91 | \$6,372,876. |
| Cost per case | 14.86 | 18.44 | 18.30 | 19.60 | 12.48 | 18.27 | 15.92 | |
| Total cases | 68,700 | 53,338 | 63,472 | 36,888 | 74,937 | 49,983 | 48,133 | 393,451 |
| Trap fish - Cases | 25,763 | 8,306 | 13,845 | 5,793 | 22,390 | 10,051 | 10,327 | 105,477 |
| | 42,937 | 45,030 | 49,627 | 31,095 | 52,547 | 39,932 | 26,806 | 287,974 |

Schedule "B" to Affidavit
TRAP PRODUCTION ON OPERATIONS
SUMMARY OF CALCULATIONS
Annette Islands Canning Co.

| | 1958 | 1957 | 1956 | 1955 | 1954 | 1953 | 1952 | Seven Year Total | Average |
|--|-----------------|----------------|-----------------|----------------|-----------------|-----------------|-----------------|---------------------|-----------------|
| Net sales less selling expenses | \$1,326,959.91 | \$1,043,898.70 | \$1,295,091.90 | \$ 756,321.92 | \$1,308,840.88 | \$ 720,163.28 | \$ 721,208.80 | \$7,172,485.39 | \$1,024,640.77 |
| Less trap fish | 498,756.21 | 178,068.76 | 299,296.24 | 122,978.16 | 435,673.31 | 169,564.75 | 327,474.00 | 2,031,812.43 | 290,258.92 |
| | \$ 828,203.70 | \$ 865,829.94 | \$ 995,795.66 | \$ 633,342.76 | \$ 873,167.57 | \$ 550,598.53 | \$ 393,734.80 | \$5,140,672.96 | \$ 734,381.85 |
| Production costs | \$1,022,387.79 | \$ 983,467.84 | \$1,161,455.23 | \$ 722,831.61 | \$ 935,422.67 | \$ 813,091.16 | \$ 734,219.91 | \$6,372,876.21 | \$ 910,410.89 |
| Less cost reductions if no traps | 177,020.76 | 117,940.31 | 126,722.94 | 95,363.91 | \$ 141,090.48 | 159,931.44 | 164,571.91 | 982,641.75 | 140,377.39 |
| | \$ 845,367.03 | \$ 865,527.53 | \$1,034,732.29 | \$ 627,467.70 | \$ 794,332.19 | \$ 653,159.72 | \$ 569,648.00 | \$5,390,234.46 | \$ 770,033.50 |
| Gross Profit (loss) if no traps | (\$ 17,163.33) | \$ 302.41 | (\$ 336,936.63) | \$ 5,875.06 | \$ 778,835.38 | (\$ 102,561.19) | (\$ 175,013.20) | (\$ 249,561.50) | (\$ 35,651.64) |
| Administrative expense, interest, etc. | \$ 51,465.74 | \$ 25,952.83 | \$ 27,130.92 | \$ 22,499.87 | \$ 25,615.12 | \$ 23,397.68 | \$ 20,498.53 | \$ 196,569.59 | \$ 28,081.37 |
| Less cost reductions if no traps | 3,349.19 | 1,495.44 | 2,078.75 | 984.81 | 2,686.80 | 1,009.69 | 1,546.16 | 14,048.84 | 2,006.98 |
| | \$ 42,116.55 | \$ 24,457.39 | \$ 25,063.07 | \$ 21,515.06 | \$ 22,928.32 | \$ 21,487.99 | \$ 18,952.37 | \$ 182,520.75 | \$ 26,074.39 |
| Net profit (loss) if no traps | (\$ 65,279.88) | (\$ 24,154.95) | (\$ 63,999.70) | (\$ 15,640.00) | \$ 55,907.06 | (\$ 124,049.18) | (\$ 194,855.57) | (\$ 432,082.25) | (\$ 61,726.04) |
| Net profit (loss) actual | 253,106.38 | 24,478.03 | 106,496.85 | 10,990.44 | 347,803.09 | (116,325.56) | (33,509.64) | 603,039.59 | 86,148.51 |
| Loss to Metlakatla | (\$ 318,386.26) | (\$ 58,633.01) | (\$ 170,496.55) | (\$ 26,630.44) | (\$ 291,896.03) | (\$ 7,723.62) | (\$ 161,355.93) | (\$1,035,121.84) | (\$ 147,876.55) |
| Pack | | | | | | | | | |
| Production costs - Seine fish | \$ 845,387.03 | \$ 865,527.53 | \$1,034,732.29 | \$ 627,467.70 | \$ 794,332.19 | \$ 653,159.72 | \$ 569,648.00 | \$5,390,234.46 | \$ 770,633.49 |
| Cost per case | 19.69 | 19.22 | 20.85 | 20.18 | 15.12 | 16.36 | 21.25 | | |
| Production costs - Seine & Trap fish | \$1,022,387.79 | \$ 983,467.84 | \$1,161,455.23 | \$ 722,831.61 | \$ 935,422.67 | \$ 813,091.16 | \$ 734,219.91 | \$6,372,876.21 | \$ 910,410.89 |
| Cost per case | 14.86 | 18.44 | 18.30 | 19.60 | 12.48 | 18.27 | 15.92 | | |
| Total cases | 68,700 | 53,338 | 63,472 | 36,888 | 74,937 | 49,983 | 48,133 | 393,451 | 56,207 |
| Trap fish - Cases | 25,763 | 8,306 | 13,845 | 5,793 | 22,390 | 10,051 | 10,327 | 105,477 | 15,663 |
| | 42,937 | 45,030 | 49,627 | 31,095 | 52,547 | 39,932 | 26,806 | 287,974 | 41,139 |

Schedule "C" to Affidavit
COST REDUCTIONS IF NO TRAPS ARE OPERATED
 June 15, 1959 SUPPORTING SCHEDULE "B"
 Annette Islands Canning Co.

| | 1958 | 1957 | 1956 | 1955 | 1954 | 1953 | 1952 | Total |
|--|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|-------------------|
| COST REDUCTIONS IF NO TRAPS | | | | | | | | |
| DIRECT TRAP COSTS: | | | | | | | | |
| Trap Construction Labor & Material | \$ 37,875.69 | \$ 34,088.59 | \$ 34,658.87 | \$ 27,908.68 | \$ 31,100.89 | \$ 59,117.14 | \$ 47,785.64 | \$272,535. |
| Floating Equipment Costs | 22,192.11 | 21,228.41 | 20,258.96 | 19,175.51 | 22,214.27 | 36,867.31 | 35,839.23 | 177,775. |
| Trap Watchmen and Mess | 9,880.19 | 7,148.67 | 8,819.96 | 8,088.52 | 8,938.12 | 14,546.79 | 11,526.18 | 66,948. |
| Cans, Cartons, Salt | 54,617.56 | 17,446.80 | 26,167.05 | 10,601.19 | 38,063.00 | 16,634.66 | 31,696.28 | 195,276. |
| Labor - See below | 19,094.00 | 18,360.00 | 14,688.00 | 14,688.00 | 14,688.00 | 14,688.00 | 14,688.00 | 110,894. |
| Cannery Overhead - See below | 16,100.00 | 14,600.00 | 14,100.00 | 13,600.00 | 13,100.00 | 12,600.00 | 12,600.00 | 96,700. |
| Longshoring | 515.26 | 249.20 | 553.80 | 231.72 | 1,119.50 | 502.55 | 773.08 | 3,945. |
| Shipping Expenses - Cannery to Seattle | 16,745.95 | 4,818.64 | 7,476.30 | 3,070.29 | 11,866.70 | 4,924.99 | 9,663.50 | 58,566. |
| | <u>\$177,020.76</u> | <u>\$117,940.31</u> | <u>\$126,722.94</u> | <u>\$ 95,363.91</u> | <u>\$141,090.48</u> | <u>\$159,931.44</u> | <u>\$164,571.91</u> | <u>\$982,641.</u> |
| Administrative Expenses: | | | | | | | | |
| Association Dues | 2,061.04 | 996.98 | 1,384.50 | 695.16 | 1,791.20 | 804.08 | 1,352.89 | 9,085. |
| Interest | 1,288.15 | 498.48 | 692.25 | 289.65 | 895.60 | 1,105.61 | 193.27 | 4,963. |
| | <u>\$ 3,349.19</u> | <u>\$ 1,495.44</u> | <u>\$ 2,076.75</u> | <u>\$ 984.81</u> | <u>\$ 2,686.80</u> | <u>\$ 1,909.69</u> | <u>\$ 1,546.16</u> | <u>\$ 14,048.</u> |
| CANNERY OVERHEAD REDUCTIONS | | | | | | | | |
| Cannery Mess | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 7,000. |
| Fuel Oil | 400.00 | 400.00 | 400.00 | 400.00 | 400.00 | 400.00 | 400.00 | 2,800. |
| Insurance | 2,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 11,500. |
| Transportation | 500.00 | 450.00 | 450.00 | 450.00 | 450.00 | 450.00 | 450.00 | 3,200. |
| Rubber clothing and Gloves | 200.00 | 250.00 | 250.00 | 250.00 | 250.00 | 250.00 | 250.00 | 1,700. |
| Depreciation | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 49,000. |
| Miscellaneous Items | 4,500.00 | 4,000.00 | 3,500.00 | 3,000.00 | 2,500.00 | 2,000.00 | 2,000.00 | 21,500. |
| | <u>\$ 16,100.00</u> | <u>\$ 14,600.00</u> | <u>\$ 14,100.00</u> | <u>\$ 13,600.00</u> | <u>\$ 13,100.00</u> | <u>\$ 12,600.00</u> | <u>\$ 12,600.00</u> | <u>\$ 96,700</u> |
| LABOR COST REDUCTIONS | | | | | | | | |
| 34 Employees x Seasonal Guarantee | 17,680.00 | 17,000.00 | 13,600.00 | \$ 13,600.00 | \$ 13,600.00 | \$ 13,600.00 | \$ 13,600.00 | \$102,680 |
| Payroll Taxes and Insurance | 1,414.00 | 1,360.00 | 1,088.00 | 1,088.00 | 1,088.00 | 1,088.00 | 1,088.00 | 8,214 |
| | <u>\$ 19,094.00</u> | <u>\$ 18,360.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$110,894</u> |
| Seasonal Guarantee | \$ 520.00 | \$ 500.00 | \$ 400.00 | \$ 400.00 | \$ 400.00 | \$ 400.00 | \$ 400.00 | \$ 3,020 |

Schedule "C" to Affidavit
S IF NO TRAPS ARE OPERATED
 SUPPORTING SCHEDULE "B"
 Annette Islands Canning Co.

| | 1958 | 1957 | 1956 | 1955 | 1954 | 1953 | 1952 | Total | Average |
|--|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| NO TRAPS | | | | | | | | | |
| Trap Construction Labor & Material | \$ 37,875.69 | \$ 34,088.59 | \$ 34,658.87 | \$ 27,908.68 | \$ 31,100.89 | \$ 59,117.14 | \$ 47,785.64 | \$272,535.50 | \$38,933.64 |
| Floating Equipment Costs | 22,192.11 | 21,228.41 | 20,258.96 | 19,175.51 | 22,214.27 | 36,867.31 | 35,839.23 | 177,775.80 | 25,396.54 |
| Trap Watchmen and Mess | 9,880.19 | 7,148.67 | 8,819.96 | 8,088.52 | 8,938.12 | 14,546.79 | 11,526.18 | 66,948.43 | 9,564.06 |
| Cans, Cartons, Salt | 54,617.56 | 17,446.80 | 26,167.05 | 10,601.19 | 38,063.00 | 16,634.66 | 31,696.28 | 195,276.54 | 27,896.65 |
| Labor - See below | 19,094.00 | 18,360.00 | 14,688.00 | 14,688.00 | 14,688.00 | 14,688.00 | 14,688.00 | 110,894.00 | 15,842.00 |
| Cannery Overhead - See below | 16,100.00 | 14,600.00 | 14,100.00 | 13,600.00 | 13,100.00 | 12,600.00 | 12,600.00 | 96,700.00 | 13,814.29 |
| Longshoring | 515.26 | 249.20 | 553.80 | 231.72 | 1,119.50 | 502.55 | 773.08 | 3,945.11 | 563.59 |
| Shipping Expenses - Cannery to Seattle | 16,745.95 | 4,818.64 | 7,476.30 | 3,070.29 | 11,866.70 | 4,924.99 | 9,663.50 | 58,566.37 | 8,366.62 |
| | <u>\$177,020.76</u> | <u>\$117,940.31</u> | <u>\$126,722.94</u> | <u>\$ 95,363.91</u> | <u>\$141,090.48</u> | <u>\$159,931.44</u> | <u>\$164,571.91</u> | <u>\$982,641.75</u> | <u>\$140,377.39</u> |
| Administrative Expenses: | | | | | | | | | |
| Association Dues | 2,061.04 | 996.98 | 1,384.50 | 695.16 | 1,791.20 | 804.08 | 1,352.89 | 9,085.83 | 1,297.97 |
| Interest | 1,288.15 | 498.48 | 692.25 | 289.65 | 895.60 | 1,105.61 | 193.27 | 4,963.01 | 709.00 |
| | <u>\$ 3,349.19</u> | <u>\$ 1,495.44</u> | <u>\$ 2,076.75</u> | <u>\$ 984.81</u> | <u>\$ 2,686.80</u> | <u>\$ 1,909.69</u> | <u>\$ 1,546.16</u> | <u>\$ 14,048.84</u> | <u>\$ 2,006.97</u> |
| CANNERY OVERHEAD REDUCTIONS | | | | | | | | | |
| Cannery Mess | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 1,000.00 | 7,000.00 | 1,000.00 |
| Fuel Oil | 400.00 | 400.00 | 400.00 | 400.00 | 400.00 | 400.00 | 400.00 | 2,800.00 | 400.00 |
| Insurance | 2,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 1,500.00 | 11,500.00 | 1,642.86 |
| Transportation | 500.00 | 450.00 | 450.00 | 450.00 | 450.00 | 450.00 | 450.00 | 3,200.00 | 457.14 |
| Rubber clothing and Gloves | 200.00 | 250.00 | 250.00 | 250.00 | 250.00 | 250.00 | 250.00 | 1,700.00 | 242.86 |
| Depreciation | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 7,000.00 | 49,000.00 | 7,000.00 |
| Miscellaneous Items | 4,500.00 | 4,000.00 | 3,500.00 | 3,000.00 | 2,500.00 | 2,000.00 | 2,000.00 | 21,500.00 | 3,071.43 |
| | <u>\$ 16,100.00</u> | <u>\$ 14,600.00</u> | <u>\$ 14,100.00</u> | <u>\$ 13,600.00</u> | <u>\$ 13,100.00</u> | <u>\$ 12,600.00</u> | <u>\$ 12,600.00</u> | <u>\$ 96,700.00</u> | <u>\$ 13,814.29</u> |
| LABOR COST REDUCTIONS | | | | | | | | | |
| 34 Employees x Seasonal Guarantee | 17,680.00 | 17,000.00 | 13,600.00 | \$ 13,600.00 | \$ 13,600.00 | \$ 13,600.00 | \$ 13,600.00 | \$102,680.00 | \$ 14,668.57 |
| Payroll Taxes and Insurance | 1,414.00 | 1,360.00 | 1,088.00 | 1,088.00 | 1,088.00 | 1,088.00 | 1,088.00 | 8,214.00 | 1,173.43 |
| | <u>\$ 19,094.00</u> | <u>\$ 18,360.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$ 14,688.00</u> | <u>\$110,894.00</u> | <u>\$ 15,842.00</u> |
| Seasonal Guarantee | \$ 520.00 | \$ 500.00 | \$ 400.00 | \$ 400.00 | \$ 400.00 | \$ 400.00 | \$ 400.00 | \$ 3,020.00 | \$ 431.43 |

Schedule "D" to Affidavit

PACK AND SALES STATISTICS

| | <u>1958</u> | <u>1957</u> | <u>1956</u> | <u>1955</u> | <u>1954</u> | <u>1953</u> | <u>1952</u> |
|-------------------------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| AVERAGE SALES PRICE | | | | | | | |
| Pinks | 20.50 to 21.00 | 23.00 | 23.00 | 22.00 to 23.00 | 20.00 to 22.00 | 18.00 | 18.00 to 20.00 |
| Chums | 16.75 to 17.00 | 18.00 to 19.00 | 21.00 | 20.00 | 15 to 16 | 13.30 to 14.50 | 16.00 |
| Cohoos | 27.00 | 26.00 | 29.00 to 30.00 | 27.00 | 24 to 25 | 19.50 to 21.00 | 21.00 |
| Reds | 32.00 to 33.00 | 32.00 to 33.00 | 33.00 | 32.75 | 27.50 | 27.00 | 27.00 |
| PRODUCTION - TRAP AND SEINCE | | | | | | | |
| Pinks | 43,168 | 27,913 | 40,632 | 30,944 | 55,800 | 18,279 | 24,861 |
| Chums | 18,550 | 21,394 | 20,437 | 3,956 | 15,848 | 27,644 | 19,242 |
| Cohoos | 1,512 | 1,366 | 1,055 | 1,072 | 1,453 | 1,214 | 829 |
| Reds | 3,335 | 2,665 | 1,348 | 916 | 1,836 | 2,846 | 1,201 |
| | <u>66,565</u> | <u>53,338</u> | <u>63,472</u> | <u>36,888</u> | <u>74,937</u> | <u>49,983</u> | <u>46,133</u> |
| Other | <u>2,135</u> | | | | | | |
| | <u>68,700</u> | | | | | | |
| PRODUCTION - TRAPS ONLY | | | | | | | |
| Pinks | 20,081 | 5,751 | 11,814 | 4,613 | 20,574 | 7,154 | 12,674 |
| Chums | 3,407 | 1,367 | 985 | 498 | 954 | 1,520 | 5,527 |
| Cohoos | 627 | 413 | 458 | 420 | 188 | 639 | 615 |
| Reds | <u>1,648</u> | <u>777</u> | <u>583</u> | <u>262</u> | <u>674</u> | <u>738</u> | <u>511</u> |
| | 25,763 | 8,308 | 13,845 | 5,793 | 22,390 | 10,051 | 19,327 |
| SALES VALUE OF TRAP FISH | | | | | | | |
| Pinks | \$ 416,680.75 | \$ 132,273.00 | \$ 271,722.00 | \$ 103,792.50 | \$ 432,054.00 | \$ 128,772.00 | \$ 240,806.00 |
| Chums | 57,919.00 | 25,289.50 | 20,685.00 | 9,960.00 | 14,787.00 | 21,280.00 | 88,432.00 |
| Cohoos | 16,929.00 | 10,738.00 | 13,511.00 | 11,340.00 | 4,606.00 | 12,939.75 | 12,915.00 |
| Reds | <u>53,560.00</u> | <u>25,252.50</u> | <u>19,404.00</u> | <u>8,580.50</u> | <u>18,535.00</u> | <u>19,926.00</u> | <u>13,797.00</u> |
| | \$ 545,088.75 | \$ 193,553.00 | \$ 325,322.00 | \$ 133,673.00 | \$ 469,982.00 | \$ 182,917.75 | \$ 255,950.00 |
| Selling expense | <u>46,332.54</u> | <u>15,484.24</u> | <u>26,025.76</u> | <u>10,693.84</u> | <u>34,308.69</u> | <u>13,353.00</u> | <u>28,476.00</u> |
| Net sales value | <u>\$ 498,756.21</u> | <u>\$ 178,068.76</u> | <u>\$ 299,296.24</u> | <u>\$ 122,979.18</u> | <u>\$ 435,673.31</u> | <u>\$ 169,564.75</u> | <u>\$ 327,474.00</u> |

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Schedule "D" to Affidavit
PACK AND SALES STATISTICS

| | <u>1958</u> | <u>1957</u> | <u>1956</u> | <u>1955</u> | <u>1954</u> | <u>1953</u> | <u>1952</u> |
|----------------------|---|---|---|---|--|---|---|
| SALES PRICE | 20.50 to 21.00 16.75 to 17.00 27.00 32.00 to 33.00 | 23.00 18.00 to 19.00 26.00 32.00 to 33.00 | 23.00 21.00 29.00 to 30.00 33.00 | 22.00 to 23.00 20.00 27.00 32.75 | 20.00 to 22.00 15 to 16 24 to 25 27.50 | 18.00 13.30 to 14.50 19.50 to 21.00 27.00 | 18.00 to 20.00 16.00 21.00 27.00 |
| ON - TRAP AND SEINCE | 43,168 18,550 1,512 3,335 <hr/> 66,565 2,135 <hr/> 68,700 | 27,913 21,394 1,366 2,665 <hr/> 53,338 | 40,632 20,437 1,055 1,348 <hr/> 63,472 | 30,944 3,956 1,072 916 <hr/> 36,888 | 55,800 15,848 1,453 1,836 <hr/> 74,937 | 18,279 27,644 1,214 2,846 <hr/> 49,983 | 24,861 19,242 829 1,201 <hr/> 46,133 |
| ON - TRAPS ONLY | 20,081 3,407 627 1,648 <hr/> 25,763 | 5,751 1,367 413 777 <hr/> 8,308 | 11,814 985 458 583 <hr/> 13,845 | 4,613 498 420 262 <hr/> 5,793 | 20,574 954 188 674 <hr/> 22,390 | 7,154 1,520 639 738 <hr/> 10,051 | 12,674 5,527 615 511 <hr/> 19,327 |
| UE OF TRAP FISH | \$ 416,680.75 57,919.00 16,929.00 53,560.00 <hr/> \$ 545,088.75 | \$ 132,273.00 25,289.50 10,738.00 25,252.50 <hr/> \$ 193,553.00 | \$ 271,722.00 20,685.00 13,511.00 19,404.00 <hr/> \$ 325,322.00 | \$ 103,792.50 9,960.00 11,340.00 8,580.50 <hr/> \$ 133,673.00 | \$ 432,054.00 14,787.00 4,606.00 18,535.00 <hr/> \$ 469,982.00 | \$ 128,772.00 21,280.00 12,939.75 19,926.00 <hr/> \$ 182,917.75 | \$ 240,806.00 88,432.00 12,915.00 13,797.00 <hr/> \$ 255,950.00 |
| ense | 46,332.54 | 15,484.24 | 26,025.76 | 10,693.84 | 34,308.69 | 13,353.00 | 28,476.00 |
| value | <u>\$ 498,756.21</u> | <u>\$ 178,068.76</u> | <u>\$ 299,296.24</u> | <u>\$ 122,979.18</u> | <u>\$ 435,673.31</u> | <u>\$ 169,564.75</u> | <u>\$ 327,474.00</u> |

[fol. 28]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF RAYMOND V. HALDANE

State of Alaska)
 First Judicial Division) ss:

Raymond V. Haldane, being first duly sworn, on oath, deposes and says as follows:

I am a member of the Metlakatla Indian Community and have been such for forty-seven years. I have served on the Council of the Annette Islands Reserve since 1934, and at the present time, I am the Assistant Secretary of that body.

The 1959 salmon fishing season is due to open on July 13, 1959. Preparatory work on the traps is being performed now and has been for quite some time. Some time [fol. 29] around the weekend of July 4th, we intend to start moving traps into location and setting them in order that they might be fully operable by July 13th. The Annette Island Canning Company, the Metlakatla community cannery, is dependent almost entirely upon trap-caught fish and seine boat fish production. These boats are owned by individual members of the community, the community owns some of them which it fishes on a share basis, and some of the boats are on a "purchase-option" basis. I know of my own experience that without the trap-caught production, our community cannery will be unable to operate profitably. We are this year, and have in past years, made full utilization of our seine boat production. No substantial increase in catch from boat sources can be expected with which to replace lost trap production. The argument has been made that if these traps are eliminated from our reservation waters that the seine boats will be able to catch more fish. This is a fallacious argument and is extremely unsound.

One of the reasons for my so stating is that, with the elimination of traps elsewhere in Alaska, "outside" seine boats are coming to Alaska in tremendous numbers and they will effectively eliminate any surplus fish which might be available by the elimination of our traps, although, I cannot subscribe to the theory that the absence of traps necessarily means a greater catch for seine boats.

The Annette Island Canning Company is maintained and operated exclusively for the benefit of the Metlakatlan people. Their economic welfare, to an unparalleled degree, depends exclusively upon the cannery operation.

At the present time, Metlakatla owes the Rural Electric Administration the sum of \$1,578,781.59 (as of June 18, 1959). Interest on the principal amounts to approximately \$26,000.00 annually. Under the terms of our repayment schedule with the REA, we pay approximately \$15,000.00 to \$16,000.00 quarterly which includes interest. Under the terms of our loan with the REA, the first \$75,000.00 of profits which are available are retained by the community. The next \$72,000.00 must be paid to the REA. The excess profits, if any, are given to the community which, in turn, gives most of the excess to the Bureau of Indian Affairs and the United States Treasury where it is held in trust for the community. The Council, when it desires access to the funds thus held for it in trust, passes an ordinance, and if the ordinance is approved by the Bureau of Indian Affairs, the money is returned to us for disbursement pursuant to the purposes specified in the ordinance.

The community is also obligated to repay to the Bureau of Indian Affairs \$210,000.00. Annual installments in the amount of \$25,000.00 must be made. This indebtedness arises out of the revolving boat fund loan and repayment is secured by boat mortgages and mortgages on the cannery buildings and income. To some extent this fund is self-supporting, but in the event it doesn't make \$25,000.00 in any one year, so much of the profits as are necessary are added to the balance in the fund to raise the sum of \$25,000.00.

[fol. 30] We have eight trap sites on Annette Island. According to the order of Secretary Seaton of early March of this year, we are allowed to utilize fifty (50%) per cent

of the available trap sites. It is our intention to install traps on trap sites No. 3, 4, 6, and 8. Without the operation of these traps, our primary source of income, the life blood of our community will stop flowing. It would become, literally, a community ghost town. Without traps, we would become absolutely dependent as a community and as individuals upon the State of Alaska, or the United States of America. Most of our people would go on welfare, and we would become wards of the government in the literal sense of the word.

We usually have about twenty men engaged in pre-season work on traps alone with an average annual payroll of approximately \$30,000.00. The payroll for pre-season work done on the cannery proper amounts to approximately another \$30,000.00 annually. The labor performed in the cannery by residents of our community, during the actual season itself, is in excess of \$100,000.00. Most of this money is made by female members of the community, and it goes toward the acquisition of clothing and food, etc., for the winter months. If these people did not have a chance to make these wages in the cannery, it is safe to state that there is no place else that they could make it.

From my many years of experience with town affairs and from my intimate knowledge of the cannery operation, I can safely state that without the trap-caught production, we would be forced to curtail the cannery operation in its entirety. Without the operation of the cannery, and the wealth it creates for our community, our people would seriously suffer, to such an extent that we would be little more than an isolated native village, living on a dole, and without hope for the future. Our present achievements and desirable standard of living would go by the board and our model community, as it exists today, would be a thing of the past.

I was present in Metlakatla on June 13, 1959, when Governor William Egan spoke to the members of the Metlakatla Indian Community at the Town Hall. The Governor stated that he was under obligation to the voters of Alaska to see that no traps were operated in the coastal waters of Alaska. I gathered from what he said that he felt a deep

sense of obligation to enforce the laws no matter how much Metlakatla suffered thereby. The general tenor of his remarks was such that I rose to my feet and asked him this question: "Would you insist on total elimination of the traps even if it meant economic ruin of the Metlakatlian people for generations to come?" His answer was, in effect, that the laws of the State of Alaska would be enforced, inasmuch as he had the sworn duty to enforce them.

[fol. 31] At another point in the discussion, he was asked how he proposed to enforce these laws. He stated, in words to this effect, that he "assumed that the State policy would be to send in State officers on the traps to make arrests and confiscate the fishing gear." To do this, of course, the State Police or whoever came upon our reservation, would have to commit trespass upon our properties. In addition to these specific threats that were made to my people on June 13, 1959, I am informed and believe that arrests have been made of other natives, from other native villages to the northward, who were engaged in pre-season trap preparation. It is also my understanding that at least one trap has been confiscated, and I am firmly convinced that if the State of Alaska, its Governor, and the law enforcement officers, are not forbidden to do these things in connection with our traps, that a like course of action will be exhibited in the near future.

Dated at Ketchikan, Alaska, this 19th day of June, 1959.

Raymond V. Haldane

Subscribed and sworn to before me this 19th day of June, 1959.

Ruth E. Brown, Notary Public for Alaska, My commission expires: 9/18/60.

[fol. 32]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF HENRY J. DUNCAN

State of Alaska)
 First Judicial Division) ss:

Henry J. Duncan, being first duly sworn, on oath, deposes and says as follows:

Like Raymond Haldane, I am a member of the Metlakatla Indian Community. I have resided there for twenty-one years and have served sixteen years on the Council. At present, I am the Treasurer of the Metlakatla Indian Community and a boat owner.

In my official capacity I am fully aware of the financial structure of the Metlakatla Indian Community. In addition to the \$75,000.00 retained from the first profits by the community and the REA and Bureau of Indian Affairs revolving boat fund loans requiring repayments, twenty (20%) [fol. 33] per cent of the total net profit is first earmarked for application on indebtedness incurred by the cannery in its disaster operations in 1952 and 1953. There is considerable doubt as to what priority prevails among our creditors, but, suffice it to say, twenty (20%) per cent of the available net profit goes toward retiring heretofore incurred cannery indebtedness, \$75,000.00 of the remaining eighty (80%) per cent of net profit to the community, \$72,000.00 then to the REA and contingent amounts to the revolving boat fund. Moreover the Council is authorized to withhold, and often does, such sum or sums of money as it deems necessary for cannery replacements or repairs before depositing the remaining net profits, if any, with the Bureau of Indian Affairs.

I, too, was present at Metlakatla when Governor Egan threatened to send State Police into our waters and to

arrest our citizens and confiscate our traps, if we attempted to use traps. In view of what he said then, and in view of what has transpired recently near Kake and Angoon, I believe that the State of Alaska intends, beyond the shadow of a doubt, to move in on our operation in such a manner and at such a time as to prevent our utilizing our traps during the 1959 season, which course of action would cause us great, immediate and irreparable injury.

In such an event, I can state that Metlakatla is doomed. The statistics clearly show that we cannot run our cannery at a profit without trap-caught fish, and it follows that if our cannery falls by the wayside, so, consequently, will our community and its peoples.

Dated at Ketchikan, Alaska, this 19th day of June, 1959.

Henry J. Duncan

Subscribed and sworn to before me this 19th day of June, 1959.

Ruth E. Brown, Notary Public for Alaska, My commission expires: 9/18/60.

[fol. 34]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

AFFIDAVIT OF HENRY S. LITTLEFIELD

State of Alaska)
First Judicial Division) ss:

Henry S. Littlefield, being first duly sworn, on oath, deposes and says:

I am Mayor of the Metlakatla Indian Community, Metlakatla, Alaska; that the Community constitutes an Indian Reservation with a population of Indians of approximately 1000 inhabitants; that our ancestors settled on Annette

Island in the year 1887, having come from Canada at the invitation by and the permission of the United States; that they migrated to Alaska to escape persecution in their former settlement in Canada; that by Act of Congress in March, 1891, Annette Island was set aside as an Indian Reservation for the Metlakatla Indians; that by virtue of [fol. 35] a Presidential Proclamation issued in April, 1916, the waters surrounding Annette Island, to the extent of 3000 feet, were set aside as a fishery right for the exclusive use and benefit of the inhabitants of the reservation; that no restriction was ever made as to the manner in which said fishery right was to be exercised; that the United States as Guardian and Trustee of the Metlakatlans, its wards, has continually protected the Reservation, including the waters belonging thereto, from encroachment by others who attempted to intrude on said waters and to carry therein fishing operations.

That as a result of the creation of said Reservation, the inhabitants thereof have attained a high state of civilization; and, until the decrease in the salmon runs, have been able to realize from a salmon cannery owned and operated by the community, funds with which to educate their children and maintain a good state of health, and economic well being among our people.

That the affairs of the community are administered by a mayor and common council elected by the people, under a constitution and set of by-laws voted upon and approved by the inhabitants and approved by the Secretary of the Interior of the United States.

That Annette Island and the surrounding waters have been adjudicated by the Courts, including the Supreme Court of the United States, as an Indian Reservation; that the Guardian and Trustee for them is the United States, and the inhabitants have been judicially decided to be wards of the United States and entitled to the full protection of the Federal Government.

That the Annette Island and surrounding waters are Federal property; that the United States is the sole owner thereof and has never surrendered its ownership or control over or permitted anyone to interfere with the said Reservation.

That the salmon cannery, boats, fishing gear and fishing rights have been judicially determined to be instrumentalities of the United States.

That the economic welfare and prosperity of the community is entirely dependent upon the successful operation of its salmon cannery; that without the use of its fish traps the cannery can not be operated profitably; that the community has incurred an indebtedness to the United States in approximately the sum of two million dollars; that such indebtedness consists of loans for the construction and operation of a hydro-electric system and boat loans for the members of the reservation; that in order to secure said loans it was necessary to assure the federal government that the loans could be repaid from the operation of its [fol. 36] salmon cannery; that the profits from the said cannery have been pledged to the United States as security for the payment of said loans; that without the operation of said fish traps the loans cannot be repaid which will result in economic disaster to the inhabitants and a loss to the federal government.

That the purpose in seeking ban on the use of fish traps in Alaska was to conserve the runs of salmon; that the use and operation of the four fish traps of the community will in but a very minor manner, if any, affect the conservation of salmon in Alaska waters; that the State of Alaska will not suffer any material damage if the traps are permitted to be operated, while on the other hand, if the Indians of the reservation are denied the right they will suffer irreparable damage and loss.

Henry S. Littlefield

Subscribed and sworn to before me this 19th day of June, 1959.

A. H. Ziegler, Notary Public for Alaska, My commission expires: Sept. 9, 1959.

[fol. 38]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8066-A

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION

Comes now the plaintiff, by counsel, Ziegler, Ziegler & Cloudy, and moves the Court for a preliminary injunction in the above entitled cause enjoining defendants, William A. Egan, and The State of Alaska, their officials, agents, servants and employees from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate, and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the following sites:

- [fol. 39] 1. Annette No. 3, located at 55°02'47" North lat., 131°38'53" West long.
2. Annette No. 4, located at 55°05'41" North lat., 131°36'39" West long.
3. Annette No. 6, located at 55°00'45" North lat., 131°38'30" West long., and
4. Annette No. 8, located at 55°10'13" North lat., 131°19'31" West long.

and that they be enjoined from in any manner attempting to enforce the provisions of 17 SLA 1959, or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and that defendants be enjoined from invading, or trespassing on, plaintiff's reservation to accomplish these purposes.

The grounds in support of this motion are as follows: Immediate and irreparable injury, loss or damage will result to the plaintiff, as appears by the verified complaint on file herein, in that defendants will trespass upon plaintiff's

reservation to arrest its members and to confiscate its trap gear, and in that the threatened wrongful conduct of the defendants will deprive plaintiff of its ownership of four fully equipped floating fish traps and all of the salmon those traps would catch during the 1959 salmon fishing season, and subject plaintiff's employees to arrest and prosecution and in so doing cause the shutdown, partial or complete, of plaintiff's 1959 cannery operations thereby depriving the members of the plaintiff from employment, the fishermen [fol. 40] of the plaintiff of a market, and the members of the plaintiff from the benefits through profits that would otherwise accrue to them from the operation of said cannery and traps, and that said injury and harm is irreparable because no action at law will lie against the State of Alaska for the damages accruing thereby and the loss will be forever nonrecoverable to the plaintiff, and even assuming money damages were recoverable the loss to the social and economic welfare of the plaintiff and its members through the loss of property as described and in the loss of profits the amount of which depends upon the size of the salmon run, are not measurable in money now or hereafter.

Unless restrained, Defendants William A. Egan and The State of Alaska, and their agents will make seizures and arrests of the plaintiff and the plaintiff's agents, employees and members and seize the fish traps of the plaintiff and prevent them from being fished in accordance with the laws of the United States, and that to accomplish these things, defendants will necessarily have to trespass upon plaintiff's reservation.

Immediate and irreparable injury, loss or damage will result to the plaintiff by reason of the threatened action of the defendants, as more particularly appears in the verified complaint filed herein. The plaintiff has no adequate remedy at law.

If this preliminary injunction be granted, the injury, if any, to the defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

Ziegler, Ziegler & Cloudy, Counsel for the Plaintiff,
Box 1079, Ketchikan, Alaska, By [Signature illegible], Of Counsel.

[fol. 41]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8066-A

[Title omitted]

MOTION TO DISMISS

Comes now the defendant, Governor of Alaska, through his attorney, the Attorney General, and moves this Court to dismiss the cause herein on the ground that the complaint fails to state a claim upon which relief may be granted.

1. The situs of all places here involved is within Inland waters of Alaska or on tidelands of Alaska over which the State has, in this instance, exclusive jurisdiction.

2. Plaintiff has no property right in a fish trap location.

3. The State of Alaska has authority to prohibit fish traps for use in commercial fishing.

[fol. 42] 4. The Constitution of Alaska, prohibiting fish traps without exception, has amended the White Act, 48 U.S.C.A. 221 et seq.

5. Regulation 115.26, Revised Regulations of 1959, promulgated by the Secretary of the Interior, Fred A. Seaton, is invalid.

a. Creates a discrimination not permitted under the White Act.

b. Conflicts with the Constitution of Alaska.

And for such other reasons as may appear from the memorandum to be filed herein and made a part of this motion.

Dated at Juneau, Alaska, this 25th day of June, 1959.

John L. Rader, Attorney General of Alaska, By
James M. Fitzgerald, Special Assistant Attorney
General.

[fol. 43]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DISTRICT NO. ONE AT JUNEAU

AFFIDAVIT OF WALTER KIRKNESS

State of Alaska)
 Division Number One) ss:

I, Walter Kirkness, being first duly sworn, on oath depose and say that I make the following affidavit of my own knowledge and the facts are true:

1. That I am the Senior Biologist in the Commercial Fisheries Division, Alaska Department of Fish and Game, and have been employed by that department for nine years in the Territory and now the State of Alaska.

2. That I am familiar with the trap sites of the Angoon and Kake communities as described in their complaints filed herein; that the fish which would normally supply the catch for said traps are migratory and destined for many parts of Southeastern Alaska to rivers and streams, some many miles away from the trap sites; that therefore any fish which would escape the traps or which are conversely caught in the traps are respectively available or not to other fishermen of Alaska who are prohibited the use of fish traps, and, in the event they are not caught, represent the escapement for spawning to provide for future runs.

3. That the plaintiffs' allegations of irreparable damage and loss of a given per cent of fish for their cannery purposes is in some respects speculative, due to the following facts:

a. In past years, approximately 25 to 61 per cent of the fish caught in Southeastern Alaska were caught in fish traps, the type which are now generally prohibited except for those of the plaintiffs herein and four additional traps located near Metlakatla; that in the past there were a total of from 113 to 262 traps fishing in the area generally known as Southeastern Alaska; that due to the fact that all but a very small number of these traps admittedly will not be fishing, it is only reasonable to anticipate, and in my professional judgment I do reasonably expect, that the

catch per seine boat will increase substantially over that of previous years.

b. In addition to the foregoing, which indicates an increased efficiency and productiveness of seine boats, the [fol. 44] Federal Fish and Wildlife regulations at this time permit fishing at all times except from 6:00 P.M. Friday to the following 6:00 A.M. Monday during the season; that in the event that there is more escapement than reasonably determined necessary for spawning, it is quite probable that the regulations will be extended to permit approximately 24 hours more fishing per week per boat. Mathematically, this will increase in excess of 20 per cent the fishing time of each boat.

4. That neither this affiant nor the plaintiffs can say with certainty what the increased productivity of the seine boats may or may not be, due to the factors above-said and due to the further fact of the cyclical nature of the runs which cannot be determined in advance with precise accuracy, but rather must be estimated, based upon available statistical and other information from previous years. In view of the foregoing, the amount of damage to plaintiffs from not using their traps is speculative.

5. In addition to the foregoing, the plaintiffs can, if they desire, bid against other canneries in Southeastern Alaska for independent seine boat catches and thereby acquire additional fish, depending upon the amount bid as compared with other canneries; that because of the competition of the market, affiant states that the increased cost of such bidding by plaintiffs will be regulated by normal principles of competition in the market place.

Further, affiant sayeth not.

Dated at Juneau, Alaska, this 23rd day of June, 1959.

Walter Kirkness

Subscribed and sworn to before me this 23rd day of June, 1959.

Helen T. Monsen, My commission expires May 2, 1962.

Copy received 6-23-59, B. L. Jernberg.

[fol. 45]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DISTRICT NO. ONE AT JUNEAU

 No. 8063

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,
Defendant.

 No. 8064

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—vs.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,
Defendant.

AFFIDAVIT OF HAAKON B. FRIELE

Haakon B. Friele, being first duly sworn, on oath, deposes and says:

That he has been actively engaged in the Alaska salmon canning industry since 1916, and has been the managing officer of the Nakat Packing Corporation and its predecessor, which has been one of the principal companies in the catching and packing of Alaska salmon since 1922.

That affiant has conducted fishing operations during all of this time in Southeastern Alaska, utilizing both seine caught fish and trap caught fish, and is fully familiar with all aspects of the fishing industry as it exists in that area. Affiant has been requested to explain for the purposes of this proceeding the reason for the closure of some canneries and the plans for reduced production in others,

[fol. 46] which affiant states herein without in any manner taking sides with either party in the above entitled lawsuit.

The Nakat Packing Corporation is the owner of two canneries located in Southeastern Alaska, near Ketchikan, which operated in 1958. One of these canneries is called Waterfall, and the other is called Sunny Point. The two canneries produced a total of 146,689 cases of salmon worth \$3,280,071.00. Of this pack, 44,700 cases worth \$1,012,055.00 were obtained from purse seine vessels and 101,989 cases valued at \$2,268,016.00 were supplied by traps. The traps therefore supplied approximately two-thirds of the total production of these two canneries.

With the loss of the fish obtained from traps, the Nakat Packing Corporation was forced to close the Sunny Point Cannery and operate the Waterfall cannery on a reduced basis, although this company will make every effort to utilize all of the seine boats it has utilized in the past, and any additional seine boats from which it can purchase fish.

In estimating the amount of production which could be expected from seine boats in Southeastern, the following factors were considered:

1. *Size of Run.*

The production in Southeastern for the last five years, as reported by the Final Report of the United States Fish and Wildlife Service for 1958, has been as follows:

| | |
|------|-----------------|
| 1954 | 1,312,112 cases |
| 1955 | 839,752 cases |
| 1956 | 1,049,174 cases |
| 1957 | 910,394 cases |
| 1958 | 1,194,047 cases |

[fol. 47] Approximately two-thirds of this run consists of pink salmon, and estimates of the total run for each year are based largely on the pink salmon expectation. The progress report on Alaska fisheries management and research for 1958, prepared by the United States Fish and Wildlife Service on page 8 states:

"Considering the data afforded by the three indices used in predicting the magnitude of the pink salmon

run; i.e., escapement, fry enumeration, and fingerling enumeration, it is anticipated that the size of the 1959 pink salmon run in Southeastern Alaska will be between those of 1957 and 1958."

This prediction would make the 1959 run somewhat better than 1955, 1956 and 1957, but not quite as good as 1954 and 1958.

2. *Increase of seine catch in absence of traps.*

In the past, seine boats have accounted for not more than 40% of the total production in Southeastern Alaska, notwithstanding that every effort has been made to increase the catch of seine boats and to utilize all boats available. If the total catch of all seine boats was increased 25% per boat, this increase would still make up only 10% of the 60% lost trap production. It is unlikely that the seine boat production would increase more than this amount. Of course, some fish which would have been caught by traps will this year be caught by seine boats, but most of this fish will escape because the available seine boats cannot fish effectively enough or cover enough area to catch the remaining fish.

[fol. 48] 3. *Extension of fishing time per week.*

In 1958, the seine fishing effort was permitted for five days per week from Monday through Friday. Under Federal law (White Act, 48 USC Sec. 234), Sunday is closed permanently to all commercial gear. It may be that the Fish and Wildlife Service could extend the weekly fishing period by one day through Saturday. However, fishing experience establishes that the catches are best on Monday and decline steadily to the end of the week, disregarding increase or decrease in the runs. On the average, Friday would supply only about 10% of the week's total catch, and presumably the decline would continue on Saturday. Fishing on Saturday therefore would make no significant contribution to increasing the total production. The reason for this decline in fishing efficiency during the week is that

the fish tend to school when fishing is suspended over the week end, and disband upon the commencement of fishing on Monday.

4. *Opening additional areas.*

The opening of additional areas would not be a great contributing factor in increasing seine production unless the number of seine boats was increased to utilize the new areas opened. There is no prospect of a substantial increase in the number of these boats in 1959, and the distribution of boats available is entirely unpredictable.

5. *Construction of new seine boats.*

It is possible to increase the number of seine boats to replace lost trap production, but this can only be done over a period of several years and assuming the [fol. 49] capital investment is available. It would require an average of at least two modern purse seine vessels, costing well over \$100,000 for the two, to replace one average trap. There is the further problem of adequately training crews with sufficient skill to economically and safely operate the vessels. There is a shortage of qualified seine boat fishermen and masters, and it will take a concerted effort and several years of training to alleviate this shortage.

6. *Purchasing fish from independent boats.*

The economics of operating a purse seine vessel have been such that practically all owners of such vessels have financing agreements with particular canneries, whereby they agree to sell all of their fish supply to their cannery in exchange for being financed throughout the winter and from year to year in their fishing effort. As a result, less than 5% of the seine fleet are truly independent and free to sell their fish to whomsoever they like. Although it is true that the price of fish may fluctuate, and a person offering a higher price might for the period of a day obtain a greater supply, the increased price would be quickly met by the other packers and the status quo maintained, unless the price were so high as to be ruinous to the cannery offering it.

Consideration of the foregoing factors resulted in the conclusion of salmon cannery operators that the production in Southeastern would be reduced to about one-half, as a result of which the following canneries, representing approximately 25% of the total production in Southeastern [fol. 50] for 1958, will be closed:

George Inlet
Fidalgo Island
Sunny Point
Wrangell
Douglas

In addition, the remaining canneries of New England at Ketchikan, Ward's Cove, Waterfall, Pacific American Fisheries at Petersburg, Kahler-Dahl at Petersburg, New England Fish Company at Chatham, Hawk Inlet, Pelican and Excursion Inlet, will all be geared to operate well under last year's operation.

Haakon B. Friele

Subscribed and sworn to before me this 25 day of June, 1959.

[Signature illegible], Notary Public in and for the State of Washington, residing at Seattle.

[fol. 51]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DISTRICT NO. ONE AT JUNEAU

No. 8063

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,
Defendant.

No. 8064

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—vs.—

WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,
Defendant.

AFFIDAVIT OF CLARENCE D. PAYNE

State of Washington)
County of King) ss:

Clarence D. Payne, being first duly sworn, on oath, deposes and says:

That I first came to Alaska and engaged in the fishing business in 1913 at the age of twenty-six and was employed in trolling and seine boat fishing. In 1920, I obtained my first trap site, and in 1935 I became part owner of a salmon cannery, and continued as a cannery operator, with some interruption during World War II, until 1958. That during the entire period from 1913 to 1958, I have been actively engaged in all aspects of the Alaska salmon catching and

canning industry, and I am entirely familiar with its present situation and past history, particularly in Southeastern Alaska where my canneries were located and the greatest part of my activities conducted.

[fol. 52] The value of my cannery at Ketchikan was established in 1958 for tax purposes in a judicial proceeding by the above entitled Court at \$533,000. With the loss of my trap sites, I can no longer continue in business and have sold the cannery for \$75,000 this year. Although since 1954, due to the reduction in fishing effort, I have operated in a joint venture with Ward's Cove Packing Company, and have not operated my own cannery, I was nevertheless optimistic that with the increasing fish supply, it would again be operated. However, with the loss of traps, I not only lost all opportunity of ever again operating my own cannery, but was also thrown completely out of the salmon business, even on a joint venture basis with Ward's Cove Packing Company. The reason is that all of my fish had been supplied from my fish traps, and with the sudden abolishment of fish traps without warning in 1959, inventory of trap equipment, boats and other gear of over \$200,000 was destroyed, subject to very questionable salvage value. This left me without the finances to even attempt to build up a purse seine fleet to substitute for the lost trap production.

Furthermore, there are no purse seine boats generally available, as ninety-five percent of all existing boats are tied up with financial arrangements with canneries under which, in exchange for financing and other assistance, the boats supply all of their fish to their financing cannery.

In the past, trap caught fish have uniformly accounted for over sixty percent of the salmon pack, and this was approximately true in 1958. The remaining forty percent of the pack was supplied by purse seine vessels. If these vessels increase their catch by as much as twenty-five percent, which would be more than the best estimates of [fol. 53] those familiar with the business, it would still only increase the total seine catch to fifty percent of the 1958 total production. As only five percent of this total seine catch is completely independent, there is simply not enough

independent fish for anyone who does not have his own purse seine fleet to acquire and run a cannery or participate with other cannerys.

If a person could afford to substantially raise the price offered the seine boats, he might get some extra fish for a day, but the other packers would meet the price and the original purchaser would be back where he started, without a supply of fish.

It is roughly estimated that it will require approximately \$150,000 in investment in seine boats to replace the production of one trap. As my company owned and operated five traps, it would require \$750,000 to replace the capacity of these traps with seine boats. It would also require a period of several years to build and equip the boats, and obtain or train crews sufficiently skilled to fish the boats and make it pay. As I did not have that kind of money available, and as I could not finance myself in any event over the intervening years while developing this production, I had no choice but to sell my entire plant and equipment for mere salvage value. Libby, McNeill & Libby also sold all of its Alaska investment in cannery plants and equipment because it was not economic for it to make the transition to a seine fish operation under the circumstances.

As of this time, the following cannerys which operated last year in Southeastern Alaska will not operate in 1959:

George Inlet Cannery
Fidalgo Island Cannery
Sunny Point Cannery
Wrangell Cannery
Douglas Cannery

[fol. 54] These cannerys represent over 25 percent in productive capacity of the total Southeastern pack. The remaining cannerys which are operating are doing so on a limited basis. This sharply reduced operation is based on the unanimous expectation of the various cannery operators that the 1959 Southeastern purse seine fleet will not supply more than fifty percent at best of the 1958 fish production,

although the Southeastern salmon run in 1959 is expected to be almost as good as 1958.

Clarence D. Payne

Subscribed and sworn to before me this 25th day of June, 1959.

VIRGINIA COLEMAN, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 173]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Causes 8063-A and 8064-A

AFFIDAVIT OF ALF ERICKSON

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

Alf Erickson

Subscribed and sworn to before me at Wrangell Alaska this 24th day of June 1959.

Arthur B. Nelson

[fol. 174]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Causes 8063-A and 8064-A

AFFIDAVIT OF NEIL GRANT

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

Neil Grant

Subscribed and sworn to before me at Wrangell Alaska this 24th day of June 1959.

Arthur B. Nelson

[fol. 175]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU
Causes 8063-A and 8064-A

AFFIDAVIT OF HAROLD MARTINDALE

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

Harold Martindale

Subscribed and sworn to before me at Wrangell Alaska
this 24th day of June 1959.

Arthur B. Nelson

[fol. 176]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU
Causes 8063-A and 8064-A

AFFIDAVIT OF WILLIAM E. SMITH

I am an independent seine vessel owner and as such I am free to sell my catch to any cannery I choose, one of the prime factors in my selection being the price paid for my fish.

William E. Smith

Subscribed and sworn to before me at Wrangell Alaska
this 24th day of June 1959.

Arthur B. Nelson

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IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
 DIVISION NUMBER ONE, AT JUNEAU
 Causes 8063-A and 8064-A

AFFIDAVIT OF PETERSBURG FISHING VESSEL
 OWNERS' COOPERATIVE

Petersburg, Alaska

June 25, 1959

| | | | |
|---------------------|-------------|------------------------|-------------|
| K. SATHER | ZAREMBO | WALTER HOFSTAD | B & H |
| LIVER HOFSTAD | SARAH MARIA | ANDREW GJERDE | HAPPY |
| ILLIAM LOVE | REX | JACK O'DONNELL | ALASKA MAID |
| ELS OTNESS | SEANNA | FRED MAGIL | ELIZABETH |
| AROLD SISSON | LORELEI | ERIC FUGELVOG | BALDER |
| OWARD CONN | ROSCO 1 | KURT NORDGREN | LOIS W |
| NDY WIKAN | CURLEW | GORDON JENSEN | SYMPHONY |
| MRS ODEGAARD | THOR | LEONARD MARTENS | LOUI M |
| IF STROMDAHL | ASTRID | PETER PHILBIN | PROGRESS |
| IN E. OTNESS | TEDDY J | LLOYD PEDERSON | MIDDELTON |
| ED NESS | LIBBY 8 | PHILLIP CLAUSEN | HORNET |
| ELING ESPESETH | BRAVO | A. H. GJERDE | MIDWAY |
| IL MATHISEN | LENOR | NORMAN TATE | SURF |
| TAGABAN | GJOA | RAY THOMASSEN | SHIRLEY |
| ADOLPH MATHISEN | HARMONY | MAGNUS MARTENS | PAMELA RAE |
| AM IDEM | MISS NORMA | ERNEST ENGE | AUGUSTA |
| ED HALTINER | VERMA | NELS EVENS | IRA 11 |
| PER HALLINGSTAD, SR | BROOKLYN | SAPSER HALLINGSTAD, JR | RAVEN |
| EAR SANDVIK | MUNROE | DICK BIRCH | LE CONTE |
| AUL OLSEN | TORUN | ALVIN FREDRICKSEN | WHIDBY |
| ANDREW HANSON | SOKOL | | |

The above 41 seine vessels are independent and as such are free to sell their catch to any cannery they choose, one of the prime factors in their selection being the price paid for fish.

Andy Wikan, President.

[fol. 178]

Causes 8063-A and 8064-A

**AFFIDAVIT OF PETERSBURG FISHING VESSEL
OWNERS' COOPERATIVE**

United States of America) ss:
State of Alaska)

I, Vernon A. Counter, Notary Public in and for the State of Alaska, duly sworn and commissioned, do hereby certify that on this 25th day of June, 1959, personally appeared before me Andy Wikan, to me known to be the President of the Petersburg Fishing Vessels Owners Cooperative, a corporation organized under the laws of the State of Alaska, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given Under My Hand and Official Seal this 25th day of June, 1959.

Vernon A. Counter, U.S. Commissioner and Ex-
Officio Notary Public, Petersburg Precinct, State
of Alaska.

[fol. 179]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

No. 8063-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA, Plaintiff,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska,
Defendant.

No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska,
Defendant.

No. 8066-A

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE,
A Federally Chartered Corporation, Plaintiff,

—vs.—

WILLIAM A. EGAN, Governor of the State of Alaska, and
THE STATE OF ALASKA, Defendants.

REPORTER'S TRANSCRIPT OF EXTRACT OF PROCEEDINGS—
June 29, 1959

On the 29th day of June, 1959, court having convened at 9:30 o'clock a.m., at Juneau, Alaska, the first two of the above-entitled causes came on for hearing; the Honorable Raymond J. Kelly, United States District Judge, presiding; and the following is an extract of the proceedings:

[fol. 180] The Court: Before you go into that, before you go into your argument, in view of the statement made by the counsel for the Governor, I think it might be well to state what this Court feels is the general proposition that we should face. This is an interim court during the transition of the judicial system from the Territorial to the State status. As far as the State Act is concerned, we enjoy a dual personality. Whatever might be said in reference to the Federal end of it, there certainly seems to be no question at this time but what we are acting as a State Court.

* Now, I believe it is well recognized that the exercise by a state of the Union of a lawful power vested in it is not

subject to judicial supervision. Those are matters that we are going to determine as we go along. It has even been held that rights guaranteed by the Constitution are subject to the imposition of states' standards which are not discriminatory and which do not contravene any restrictions that Congress, acting pursuant to its Constitutional powers, has imposed.

In reference to our jurisdiction, litigants asserting Federal rights as a basis of a claim or as a defense to a claim under state law may do so in state courts which must recognize and protect the Federal rights. There is a duty resting upon state as well as Federal Courts to protect and enforce rights lawfully created without reference to the particular government from whose exercise of lawful power the rights arose. Litigants resting on a Federal right need not resort to Federal Courts to protect those rights where such rights are put in jeopardy in state proceedings.

While Congress has granted to District Courts jurisdiction [fol. 181] over cases arising under the Constitution, that is 28 U.S. Code Sec. 1331, that that jurisdiction need not be exercised where it would be appositive of state action and lead to needless interference with state agencies, it likewise need not be exercised where the resolution of state law questions which are complex or unsettled may make it necessary to reach a Federal Constitutional question.

It seems to be well-established procedure, aimed at the avoidance of unnecessary interference by the Federal Courts with proper and validly administered state concerns, to afford state courts a reasonable opportunity to construe state statutes. Federal Courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them.

The Supreme Court has increasingly recognized the wisdom of staying actions in the Federal Courts pending determination by a state court of decisive issues of state law, and, in fact, they have even required United States District Courts to stay their proceedings pending the submission of the state law question to state determination.

I just wanted to put that in the record so as to indicate it is my feeling that we are on perfectly solid ground.

[fol. 182]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
DIVISION NUMBER ONE, AT JUNEAU

Consolidated Civil Cases Nos. 8063 and 8064-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA, Appellant,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska,
Appellee.

ANGOON COMMUNITY ASSOCIATION, Appellant,

—vs.—

WILLIAM A. EGAN, as Governor of the State of Alaska,
Appellee.

Civil Cause No. 8066-A

Combined with the above two Civil cases on Appeal.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,
a Federally Chartered Corporation, Appellant,

—vs.—

WILLIAM A. EGAN, Governor of the State of Alaska, and
THE STATE OF ALASKA, Appellee.

EXTRACT OF REPORTER'S TRANSCRIPT OF PROCEEDINGS ON
JULY 1, 1959, CONTAINING APPELLANTS' ORAL
NOTICE OF APPEAL

Extract as Reflected on Page 12 of the Reporter's Transcript.

"Mr. Jernberg: If the Court please, on behalf of
Angoon and Kake we now give notice of appeal and ask

that the record so show, and we will file a formal notice a little later on today. We also would like to ask the Court and counsel if they would stipulate that the original record may be transferred by the Clerk of this Court to the Clerk of the Supreme Court of the United States.

Mr. Robert H. Ziegler: Your Honor, may Mr. Jernberg's remarks be deemed applicable to the Metlakatla case, No. 8066-A.

The Court: Certainly. The opinion applies to both."

[fol. 183]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

Civil Action No. 8066-A

—and—

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE,
a federally chartered corporation, Plaintiff,**

—v.—

**WILLIAM A. EGAN, Governor of the State of Alaska, and
THE STATE OF ALASKA, Defendants.**

R. L. Jernberg, of Gore & Jernberg, Ketchikan, and C. L. Cloudy, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiffs Organized Village of Kake and Angoon Community Association.

Robert H. Ziegler, Sr., and A. H. Ziegler, of Ziegler, Ziegler & Cloudy, Ketchikan, for plaintiff Metlakatla Indian Community, Annette Islands Reserve.

John L. Rader, Attorney General of Alaska, James M. Fitzgerald, Special Assistant Attorney General, and Douglas L. Gregg, Assistant Attorney General, for defendants.

OPINION—Filed July 1, 1959

Kelly, Judge.

The first two captioned cases were consolidated for trial, and the third was heard the following day. Because of the similarity of the actions, the three cases are consolidated for the purpose of this opinion.

[fol. 184] The urgency of this matter makes immediate determination imperative. It would, of course, be desirable if my decision could be based on a written opinion as complete as the able briefs of counsel for both parties filed herein, but time does not permit the preparation of a formal opinion, so it must suffice that I announce my decision from the bench and do as well as possible from notes and excerpts from decisions.

I need hardly state that I agree with counsel on both sides in their expressed regard for the importance of this action now before us for decision.

We have here a conflict between the authority of the Secretary of the Interior, an officer of the United States, and the Governor of Alaska. In this it is not a conflict of these officials as individuals or personalities, but of what they represent in this controversy.

We have in effect the state opposed to the United States.

We have the majesty of the nation on one hand and the sovereignty of the state on the other; in between, three Indian communities whose plight in the dwindling fish economy of Alaska is a matter of grave concern.

Where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority, the difficult and tender problem of resolving, under existing law and judicial decisions, the question thus arising, with due regard to the dignity of the one and the sovereignty of the other, becomes the delicate task of the Court.

Able and convincing arguments have been capably presented by counsel for both sides.

[fol. 185] The facts are substantially agreed upon and are fully set forth in the pleadings, briefs and recorded statements of counsel.

After reading the pleadings and briefs, hearing the arguments, examining the exhibits and affidavits, and studying numerous authorities, I have concluded that the relief sought in these three cases must be denied and the bills of complaint therein dismissed.

I will try and state my reasons for this decision.

This Court can take judicial notice of the following facts and conditions and matters of general knowledge:

(1) There has long been growing opposition to fish traps in Alaska, and plebiscites held in the Territory in connection therewith have resulted overwhelmingly in votes for the abolishment of traps.

(2) The three Indian villages here concerned as plaintiffs in these actions had voted overwhelmingly for the abolishment of traps.

(3) The salmon runs in Alaska are being rapidly depleted.

(4) The use of fish traps takes great numbers of fish from Alaskan waters for the benefit of the few who own or control the traps.

(5) Even with trap operations, many canneries have been compelled to close in Alaska in recent years, because of lack of an adequate fish supply.

(6) Traps were reduced over the years in number and curtailed in operation, and finally abolished by the state, the well-known purpose of which was to conserve the salmon supply for the benefit of all of the people of the state as a whole.

[fol. 186] (7) Financial loss occurred to some who owned or controlled the traps each time they were cut in number or limited in operation.

I find the following statements of the law determinative of the issues in this case. The state owns the tidelands and controls all areas wherein traps were threatened to be installed. In other words, the proposed trap sites are located in inland waters over which the State of Alaska has dominion.

Mr. Justice Reed, in *Alabama v. Texas et al.*, 347 U.S. 272 at page 275, stated:

If the marginal lands were thus declared by the *California* and following cases to belong to the United States, they were ceded to the states through the subsequent Submerged Land Act of 1953 by the clause: 'Title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . are hereby . . . recognized, confirmed, established, and vested in and assigned to the respective States . . . ' Sec. 3(a). If, on the other hand, the marginal lands were not declared by those cases to belong to the United States, title to them remained in the respective states. Either by original ownership or by the cession of the

Act, the lands are now the property of the respective states . . .

The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act.

Indian fishing rights do not include the right to fish with forbidden gear or in a manner prohibited to other citizens of the state.

No property right exists in fish traps and their use has been legally prohibited in the state.

The "equal footing" clause has long been held to refer to political rights and to sovereignty and to have a direct effect on certain property rights, and the question arose early in controversies between the states and the federal government as to ownership of the shores of navigable waters, and it was held that to deny to the states, admitted subsequent to the formation of the Union, ownership of this property, would deny them admission on an equal [fol. 187] footing with the original states. *Pollard's Lessee v. Hagan*, 44 U.S. 212, 228-229 and cases cited.

Upon the admission of a state to the Union the title of the United States to lands underlying navigable waters within the state passes to it as incident to the transfer to the state of local sovereignty and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. *United States v. Oregon*, 295 U.S. 1, 14.

The lands on which the fish traps are to be moored are tidelands or lands underlying inland waters, and subject to the authority of the state to regulate fishing.

Of course the United States has responsibility under laws passed by Congress toward the Indians. The United States has made treaties—solemn pacts with Indian nations. Indians have been accorded rights by the United States in Territories and in lands controlled by the United States, but many of these rights disappear when a new state is formed. *Ward v. Race Horse*, 163 U.S. 504. In this case, on page 514, Mr. Justice White stated as follows:

• • • It may be further, for the sake of the argument, conceded that where there are rights created by Con-

gress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. . . .

See also *Kennedy v. Becker*, 241 U.S. 556; *U. S. v. Winans*, 198 U.S. 371 (384). An Indian reservation created by executive order of the President conveys no right of use or occupancy beyond the pleasure of Congress and the President.

When an Indian reservation is established by treaty the right of use or occupancy depends upon the language or the purpose expressed therein.

Congress has power to make a reservation inclusive of the adjacent waters and submerged lands as well as up-[fol. 188] lands The reservation thus created is not a private grant but simply a setting apart until otherwise provided by law.

Statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. (See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, pages 87 and 89.)

The reservation of the Metlakatla Indians was created at the will of Congress and did not constitute final disposal of the lands underlying the navigable waters. The extension of the 3,000 feet to include exclusive fishing rights by the President likewise did not constitute final disposal but only a grant until otherwise provided by law. The federal government retained jurisdiction thereof until Alaska became a state but upon achieving statehood, dominion and sovereignty thereof passed to the new state, subject only to the authority of the federal government in regulating navigation and commerce. *Pollard's Lessee*

v. Hagan, 44 U.S. 212. The presidential order which extended the exclusive fishing rights 3,000 feet offshore simply prohibited others from fishing therein and cannot be construed to permit the use of traps therein when prohibited by state law.

Under territorial status the Annette Island natives could not claim any vested property right in any particular method or means for taking fish. Their authority to operate a fishery at all came from the Secretary of the Interior under the provisions of the White Act.

The state regulates and controls wildlife resources and fisheries in the marginal sea. This was originally based on a concept of ownership. (*McCready v. Virginia*, 94 U.S. 391). This theory has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources for all the people.

The state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people. *Geer v. Connecticut*, 161 U.S. 519. See also

Skiriotes v. Florida, 313 U.S. 69

[fol. 189] *Toomer v. Witsell*, 334 U.S. 385

Corsa v. Tawes, 149 Fed. Supp. 771

The right to control fisheries rests in the state in the absence of affirmative action of Congress. *Manchest v. Mass.*, 139 U.S. 240.

Fish and game are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common. *U. S. v. Shauver*, 214 Fed. 154.

The White Act, 48 U.S.C. Sec. 221, was passed by Congress to protect and conserve fisheries in Alaska. It was amended by Sec. 6 (e) of the Alaska Statehood Act, which contained the so-called Westland proviso. The constitution of the State of Alaska became effective simultaneously with the Statehood Act, and with it Ordinance Number Three, which for reasons therein stated, abolished the use of fish traps for the taking of salmon for commercial purposes in all the coastal waters of the state.

If the White Act is amended by Sec. 6 (e) and by Ordinance Number Three as interpreted by the Secretary of the Interior (*Ketchikan Packing Co. v. Seaton*, opinion filed May 14, 1959, United States Court of Appeals for the District of Columbia) then the White Act must prohibit the use of traps in Alaskan waters.

The *Ketchikan Packing* case holds that Congress intended the Secretary to be a trustee for both the federal government and the new state during the transition of administration from the federal to the state authorities in the broad national interest. It further held that the Secretary, in that unique capacity, could not reasonably disregard a valid law of Alaska existing on January 3, 1959, the effective date of the Alaska Statehood Act and the Alaska constitution, and Ordinance Number Three.

The authority conferred upon the Secretary by existing law, as above set forth, should not be permitted to impair the powers or rights of the new state which come from the status of statehood. To do otherwise would seem to impair the equal footing standing of the new state.

[fol. 190] The White Act is still in effect and is the Act from which the Secretary of the Interior derived his authority, and this Act specifically states that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies and that no exclusive or several right of fishery shall be granted therein. Therefore the White Act forbids exclusive right of fishery. This was the holding in the case of *Hynes v. Grimes Packing Co.*, 337 U.S. 86, at page 122:

As Sec. 208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon Sec. 1 of the White Act, we think it clear that its proviso 'that no exclusive or several right of fishery shall be granted therein' applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. * * * The

White Act fishing preserves were not intended to furnish a monopoly to a favored few. * * *

There are many cases besides those which I have mentioned which have been cited by counsel in their briefs and arguments which support the conclusions here reached, that the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs, and the plaintiffs are not entitled to the relief here sought.

Findings of Fact, if desired, may be presented, together with Judgment and Decree in accordance with this opinion.

Raymond J. Kelly, U. S. District Judge.

[fol. 191]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

Civil Action No. 8066-A

—and—

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE,
a federally chartered corporation, Plaintiff,**

—v.—

**WILLIAM A. EGAN, Governor of the State of Alaska, and
THE STATE OF ALASKA, Defendants.**

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL

Come Now the parties above named by their counsel, R. L. Jernberg, C. L. Cloudy, and R. H. Ziegler, and move the Court for an order granting said parties the preliminary injunction pending appeal of said cases to the United States Supreme Court.

[fol. 192] Dated at Juneau, Alaska, this 2nd day of July, 1959.

R. L. Jernberg, C. L. Cloudy, R. H. Ziegler, By R. L. Jernberg, Of Counsel for Plaintiffs.

ORDER

The above-entitled motion having duly come on for hearing before the Court the 2nd day of July, 1959, and the Court being fully advised in the premises, does order that said motion be and the same is hereby denied.

Done in open court the second day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 193]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

SUPPLEMENTAL FINDINGS OF FACT No. 1

The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from

Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon and ending at a line drawn from the northermost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects the mainland, as more particularly described in 33 C.F.R. 82,275, are all inland waters and historic bodies of water. Because of historic, social, and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:

That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in Southcentral Alaska;

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea;

That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fiords which exist today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

[fol. 194] That the historical economy of the area involved is primarily oriented to a marine way of life in which the inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska.

SUPPLEMENTAL FINDINGS OF FACT No. 2

Although plaintiff may suffer some loss if the right to fish by means of fish traps is denied, still I find that the damages alleged are to a large extent speculative in nature because of (1) the limited predictability of the salmon runs, (2) the existence of an independent fleet of seine boats with whom plaintiffs are free to bid for their catch on the basis of the price offered therefor, and (3) the possibility of increased catches by plaintiffs' own seine boats resulting from the abolition of fish traps.

SUPPLEMENTAL FINDINGS OF FACT No. 3

The Court judicially notices that fish traps, whether of the floating or pile-driven variety, are customarily affixed to the shoreline with the remainder necessarily extending out over tidelands and beyond into the navigable waters below the meander line of mean low tide.

[fol. 195]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

No. 8066-A

In the matter of the

METLAKATLA INDIAN COMMUNITY, Plaintiff,

—vs.—

WILLIAM A. EGAN, Defendant.

ORDER FOR DISMISSAL

This Matter having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, Robert H. Ziegler, and defendant appearing through its counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental

findings of fact is in lieu of findings of fact and conclusions of law,

It Is Therefore Ordered, Adjudged and Decreed that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

Witness my hand and seal of this honorable Court this 2nd day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 212]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8063

ORGANIZED VILLAGE OF KAKE, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

Civil Action No. 8064

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

—v.—

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

AFFIDAVIT OF LT. E. L. MAYFIELD

United States of America)
State of Alaska) ss:

I, Lt. E. L. Mayfield, being first duly sworn on oath depose and say:

That I am Lt. E. L. Mayfield, the Officer in charge of the First Division of the Department of State Police; and that on June 15th, 1959, I was assigned to the duty of supervising Officers in the assignment of patrolling the area of Kake with reference to the enforcement of the Alaska Laws pertaining to fish traps;

That during the course of the following events I was present during the mooring of a fish trap identified by writing on the trap "Organized Village of Kake", Point Pybus, Fish and Wild Life, #216. At 12:55 P.M., June 17th, 1959, at a location of Point Pybus I observed the above-described fish trap being towed into location with the tail-hold secured on shore. This trap was being towed by a tug named the Snowmist, on the port side, and a power scow named Jo-G on the star board side. A rigging scow named the Iron [fol. 213] Mike was against the shore at a point about 100 yards or less from the place where a sign had been posted prohibiting the erection of fish traps. At 1:30 P.M. it appeared that the trap was in position and was being held there by a tight tow line to the Snowmist. The Jo-G was underway with the scow, Iron Mike. From 1:30 P.M. until 4:43 P.M. I observed seven anchors being attached to the trap and pulled out in several directions and dropped. This was being done by the Jo-G and the Iron Mike, with the Snowmist still holding a tight line on his tow. This operation was accomplished by the three above-named boats and 15 individuals, 3 of which were natives and gave their residence as Kake, Alaska. The remainder were white men and gave their residence as the State of Washington.

During the mooring of the fish trap, the boat called Leif, arrived and stood by until the last anchor was dropped and then pulled up along the side of the trap and anchored. Aboard the Leif were 2 white men. One identified his residence as Ketchikan, Alaska, and the other as the State of Washington.

Further affiant sayeth not.

Lieut. E. L. Mayfield

Subscribed and Sworn to before me this 29th day of June, 1959.

Helen T. Monsen, Notary Public in and for Alaska,
My Commission Expires: 5/2/1962.

APPENDIX No. 4

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

AFFIDAVIT OF PHIL R. HOLDSWORTH

United States of America)
) ss:
 State of Alaska)

Phil R. Holdsworth, being first duly sworn, deposes and says:

That he is Commissioner of Natural Resources for the State of Alaska and holds a Bachelor of Science degree in Mining Engineering and Geology.

That he has been active in the mining industry in Alaska, and has intimate knowledge of land and water conditions in Southeastern Alaska based upon thirty years of residence within the State.

That in connection with mining and land activities, he has covered much of the Alexander Archipelago on foot and by air.

That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in South-central Alaska.

That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass without actually altering its original coastline facing the open sea.

That the general land mass of the Alexander Archipelago retains its mountain range character with elevations rang-

ing from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action creating the long, narrow fiords which exist today as inland waterways, the only means of transportation throughout the Archipelago.

That two official maps published by the U. S. Geological Survey, Department of the Interior, are submitted in sup-[fol. 216] port of the above statements and are attached as Exhibits A and B.

Exhibit A. Map I-84 Miscellaneous Geologic Investigations—Mesozoic and Cenozoic Tectonic Elements of Alaska by Thomas G. Payne, 1955.

Exhibit B. Geologic Map of Alaska compiled by J. Thomas Dutro, Jr. and Thomas G. Payne, 1957.

That Exhibit A clearly shows that the Prince of Wales Geanticline, which is the Alexander Archipelago, is an extension of, and is identical with the Talkeetna Geanticline which includes the St. Elias, Wrangell, and Talkeetna Mountains.

That Exhibit B confirms the above by showing that the age and pattern of the various rock types are similar along this continuous range of mountains extending through the general land mass of Alaska from Dixon Entrance on the southeast to Bristol Bay on the southwest.

Dated this 28th day of June, 1959.

/s/ PHIL R. HOLDSWORTH
Phil R. Holdsworth

Subscribed and sworn to before me this 28th day of June, 1959.

/s/ CATHRYN C. MACK
Notary Public for Alaska

Notary Public for the State of Alaska
My Commission Expires May 12, 1963

(Notary Public Seal)

[fol. 217]

APPENDIX No. 5

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

AFFIDAVIT

United States of America,) ss:
 State of Alaska,)

James A. Williams, being first duly sworn upon his oath, deposes and says:

That he is a state mining engineer employed in the Department of Natural Resources, Division of Mines and Minerals;

That he has been employed as a mining engineer by the Territory, now State of Alaska for nine years;

That he is a graduate of the University of Alaska and holds degrees in mining engineering and geological engineering;

That he has completed a land mass and water mass survey of the entire Southeastern Panhandle from its southern most portion northward to a line drawn from a point on the sea coast, which point is due west of Mt. Fairweather;

That the island mass of Alexander Archipelago computed under this survey totals 14,400 square miles, more or less;

That the mainland land area totals 16,600 square miles, more or less;

That the total water mass of the area measured totals 7,500 to 8,000 square miles, more or less;

That the total area of Southeastern Alaska including land and water measures 38,500 square miles, more or less;

cised sovereignty which has not been successfully challenged for over 100 years;

That the exercise of such sovereignty first by Russia and subsequently by Alaska and the United States over said lands and waters, as well as the historic background of the area have led to the conclusion that the said waters are historic bodies of water and inland waters of Alaska.

/s/ EDWARD L. KEITHAHN
Edward L. Keithahn

Subscribed and sworn to before me this 29th day of June, 1959.

/s/ HELEN T. MONSEN
Notary Public in and for Alaska,
My Commission Expires: May 2, 1962.

(Notary Public Seal)

[fol. 219]

SUPREME COURT OF THE UNITED STATES
Nos. 326 and 327, October Term, 1959.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,
Appellant,

vs.

EGAN, Governor of Alaska, et al., and
ORGANIZED VILLAGE OF KAKE et al., Appellants,

vs.

EGAN, Governor of Alaska.

ORDER POSTPONING JURISDICTION—December 7, 1959

Appeals from the District Court of the State of Alaska.

The statements of jurisdiction in these cases having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. The cases are consolidated and a total of three hours is allowed for oral argument.

[fol. 221]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 326

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,
a Federally Chartered Corporation, Appellant,**

v.

**WILLIAM A. EGAN, Governor of the State of Alaska, and
THE STATE OF ALASKA, Appellees.**

**APPELLANT'S DESIGNATION OF PARTS OF RECORD TO BE
PRINTED—Filed December 28, 1959**

Appellant designates the following portions of the record
herein for printing by the Clerk of this Court:

1. Notice of Appeal: R. 1-5
2. Complaint and affidavits, including schedules: R. 6-37
3. Motion for Preliminary Injunction: R. 38-40
4. Motion to Dismiss: R. 41-42
5. Extract of Transcript: R. 179-181
6. Extract of Transcript: R. 182
7. District Court Opinion: R. 183-190
8. Motion for Injunction Pending Appeal and Order:
R. 191-192
9. Supplemental Findings: R. 193-194
10. Order of Dismissal: R. 195
11. This designation and proof of service.

Richard Schifter, Counsel for Appellant.

Dated: December 28, 1959

[fol. 222] Proof of Service (omitted in printing).

LIBRARY
SUPREME COURT, U. S.

**SUPPLEMENTAL
TRANSCRIPT OF RECORD**

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~200~~ 2

**METLAKATLA INDIAN COMMUNITY, ANNETTE
ISLAND RESERVE, APPELLANT,**

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

No. ~~200~~ 3

**ORGANIZED VILLAGE OF KAKE, ET AL.,
APPELLANTS,**

vs.

EGAN, GOVERNOR OF ALASKA.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

FILED AUGUST 20, 1959

JURISDICTION POSTPONED DECEMBER 7, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 326

METLAKATLA INDIAN COMMUNITY, ANNETTE
ISLAND RESERVE, APPELLANT,

vs.

EGAN, GOVERNOR OF ALASKA, ET AL.

No. 327

ORGANIZED VILLAGE OF KAKE, ET AL.,
APPELLANTS,

vs.

EGAN, GOVERNOR OF ALASKA.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF ALASKA

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[fol. A] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1]

**IN THE DISTRICT COURT FOR THE
STATE OF ALASKA**

DIVISION NUMBER ONE AT JUNEAU

Consolidated Civil Cases Nos. 8063-A and 8064-A

THE ORGANIZED VILLAGE OF KAKE ALASKA, Appellant,

VS.

**WILLIAM A. EGAN, as Governor of the
State of Alaska, Appellee.**

ANGOON COMMUNITY ASSOCIATION, Appellant,

VS.

**WILLIAM A. EGAN, as Governor of the
State of Alaska, Appellee.**

NOTICE OF APPEAL

I. Notice Is Hereby Given that the Organized Village of Kake Alaska, and the Angoon Community Association, federal chartered Indian corporations, Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the District Court for the State of Alaska, Division Number One, Juneau, Alaska, [fol. 2] entered July 2, 1959, dismissing the complaints filed by Appellants.

This appeal is taken pursuant to 28 USC 1257 (1) and (2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint filed by Organized Village of Kake Alaska, with affidavits of J. D. Thompson and Ernest Williams attached.
2. Complaint filed by Angoon Community Association with affidavits of Albert Thompson and Samuel Johnson attached.
3. Motion for preliminary injunction filed by Organized Village of Kake Alaska, and by Angoon Community Association.
4. Motion to dismiss complaints filed by Appellee William A. Egan against Organized Village of Kake Alaska, and Angoon Community Association.
5. Affidavit of Walter Kirkness filed by Appellee, William A. Egan.
6. Affidavits of Haakan Friele and Clarence D. Payne, filed by Appellant, Organized Village of Kake Alaska, and Angoon Community Association.
7. Brief of Appellant, Organized Village of Kake Alaska, and Angoon Community Association, filed in support of complaints.
8. Brief of Appellee, William A. Egan, filed in support of Motion to Dismiss Complaints.
9. Affidavits of Alf Erickson, Neil Grant, Harold Martindale, William E. Smith, and Andy Wikan, filed by Appellee, William A. Egan.
10. Reporter's transcript of proceedings of June 29, 1959, relating to assumption of jurisdiction by District Court as a State Court.
- [fol. 3] * 11. Reporter's transcript of record of proceedings on July 1, 1959, containing Appellants' oral notice of appeal.
12. Opinion rendered by the Court on July 1, 1959.
13. Motion for preliminary injunction pending appeal filed by Organized Village of Kake Alaska, and Angoon Community Association.

14. Order of Court denying motion for injunction pending appeal.
15. Supplemental findings of fact entered by Court on July 2, 1959.
16. Judgment of dismissal of the complaints of Organized Village of Kake Alaska, and Angoon Community Association entered July 2, 1959.

III. The following questions are presented by this appeal:

1. Is all authority to administer and manage the fish and wildlife resources of Alaska for the year 1959 reserved to the Federal Government by the terms of Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, so as to make the Alaska criminal statutes, 17 SLA 1959 as amended by 95 SLA 1959, unenforceable against the appellants by the State and its officials, and so as to make the regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing Appellants to fish the trap sites therein designated a valid exercise of that authority?
2. If Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, does purport to reserve such control to the Federal Government and thereby render inapplicable the Alaska criminal statutes, does Section 6 (e) violate the "equal footing" doctrine governing the admission of new States to the Union?
3. Does the Alaska Statehood Act, 72 Stat. 339, in Section 4 thereof and in its adoption and ratification of the Alaska Constitution (in this instance specifically Article 12, Section 12 thereof) comprehend a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and if so, is Section 4 of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the State,

[fol. 4] and further are the regulations issued by the Secretary of the Interior (24 FR 2053 et seq.) March 7, 1959, allowing Appellants to fish the trap sites therein designated a valid exercise of that authority?

4. If the Alaska Statehood Act does so comprehend a permanent disclaimer by the State of Alaska and a permanent assumption of jurisdiction by the Federal Government, does it violate the "equal footing" doctrine governing the admission of new States to the Union?

R. L. Jernberg. Attorney for The Organized Village of Kake Alaska and Angoon Community Association, Appellants. P. O. Box 893, Ketchikan, Alaska.

[fol. 5] Proof of Service (omitted in printing).

[fol. 6]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8063A

THE ORGANIZED VILLAGE OF KAKE ALASKA, Plaintiff,

VR.

WILLIAM A. EGAN, as Governor of the
State of Alaska, Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF—June 22, 1959

Comes now the plaintiff and for cause of suit alleges:

I.

That the plaintiff is a Federal Corporation, chartered as an organized Indian village under the laws of the United

States of America, which charter was ratified according to law under date of January 27, 1948, and is authorized by said charter to sue and be sued in courts of competent jurisdiction. That said village is located at Kake, Alaska; that said corporation is a membership corporation whose membership is that of the entire village, presently numbering 400 people; that the members thereof are of the Thlinget Indian Tribe; that the United States Department of Interior has authorized the institution of this suit by the plaintiff and the retention of counsel by the plaintiff for that purpose.

II.

That in July, 1950, plaintiff commenced doing business as Keku Canning Company, after the United States of America acquired title in its own name as trustee for the [fol. 7] plaintiff to certain salmon cannery property located on U. S. S. 693, at Kake, Alaska, including, but not limited to, cannery buildings, canning equipment, warehouses, docks, floats, outbuildings, boats, nine fish trap sites and the assignment of War Department Permits therefor, nine "tailhold" and "watchman cabin" sites and assignment of United States Forest Service Use Permits therefor, trap brailing tenders, trap setting tenders and rigging scows and all other equipment normally associated with the acquisition and processing of fish caught by a floating fish trap. That said purchase and acquisition was by the United States of America acting through the Department of Interior and Acts of Congress, and pursuant thereto the funds necessary to accomplish said acquisition were supplied by the United States of America in the amount of \$362,000.00, and said property has a present day book value of \$377,000.00.

III.

That since July, 1950, plaintiff has, as beneficial owner to the date of this complaint, continuously operated its cannery and fished its trap sites (during seasons prescribed by law) in pursuit of the purposes for which it was organized as a Federal chartered Indian corporation, with the exception that during the past few years of declining

salmon runs, the plaintiff has, as a party to a general agreement among the salmon industry in Alaska, restricted its use of its sites so as to use less than all of the nine sites from year to year.

IV.

That since July 1950, the funds for operation of said cannery, setting and fishing of the traps, etc., have been supplied by the United States of America; that during this period the plaintiff has paid no tax to the Territory of Alaska based upon operation of fish traps or the packing of salmon for commercial purposes by reason of the fact that it claimed exemption as a Federal chartered Indian corporation, an instrumentality of the federal government [fol. 8] and therefore exempt from taxation by the Territory.

V.

That the operation of the cannery and utilization of the fish trap sites mentioned was undertaken by the plaintiff for the purpose of furnishing employment for the members of the Organized Village of Kake, and to provide a means of allowing them to have their social and welfare needs advanced through use of profits obtained from the operation, all designed to promote the advancement of the people of the said village in a manner compatible with the intention of the Congress of the United States to care and provide for the social and economic welfare of the Indian.

VI.

That on or about November 14, 1958, the Secretary of the Interior published in the Federal Register (23 F.R. 8874) a notice that he intended to amend the then existing regulations governing fishing for or taking species of commercial fish and shellfish in the waters of Alaska, and that it was proposed to prohibit the taking of fish in Alaska waters by use of fish traps except insofar as certain Indian tribes or villages were concerned; that on March 7, 1959, the said Secretary of Interior published his amendments to the fishing regulations in 24 F.R. 2053, and therein prohibited the

taking of fish in Alaska waters by use of fish traps except that such taking would be allowed with respect to trap sites owned, among others, by the Organized Village of Kake, Alaska, plaintiff herein, therein described as follows:

(1) Kake-Cape Fanshaw, located at 57° 10' 52" N. lat. 133° 32' 44" W. long.

(2) Kake-Point Pybus, located at 57° 18' 40" N. lat. 133° 57' 21" W. long.

(3) Kake-Point Macartney, located at 57° 01' 23" N. lat. 134° 02' 50" W. long.

(4) Kake-Cornwallis, located at 56° 55' 52" W. lat. 134° 16' 08" W. long.

[fol. 9]

VII.

That on or about March 10, 1959, Elmer Bennett, the then acting Secretary of the Interior advised James E. Hawkins, Area Director, Alaska Native Service, Juneau, Alaska, that pursuant to the disclaimer of Indian fishing rights made by the State of Alaska, upon admission to the Union, and pursuant to the long-standing supervisory control exercised by the United States for the protection of the Indians, the regulations for fishing in Alaska for 1959 would permit the operation of traps by the plaintiff (among others) and that therefore the plaintiff (among others) could proceed to make plans for the operation of their salmon canneries in 1959 on the basis that they would be allowed to continue the use of such traps as designated by the Secretary; that this information was transmitted by James E. Hawkins to the plaintiff herein under date of March 16; that pursuant to the information therein contained the plaintiff then undertook to ready itself to operate its cannery for the 1959 season based upon the operation of four trap sites; that pursuant thereto, plaintiff notified the Acting Regional Director of the Bureau of Commercial Fisheries, Juneau, Alaska, under date of April 1, 1959, that plaintiff was going to operate the four above described trap sites, following which on or about May 12, 1959, plaintiff was supplied by the Petersburg office of the said

Bureau of Commercial Fisheries instructions and regulations concerning the operation of said traps and seals for their closure during closed periods.

VIII.

That on or about May 21, 1959, the defendant, William A. Egan as Governor for the State of Alaska made public his intent to seek enforcement of a Statute of the State of Alaska, identified as 17 SLA 1959 stating that said statute [fol. 10] prohibited the use of fish traps in Alaska, and that it made it a crime subject to fine and imprisonment to violate the provisions thereof and stating further that the third ordinance the Constitution of Alaska prohibited the plaintiff's use of fish traps, and that the police power of the State of Alaska prohibited said use; thereafter the said defendant on numerous occasions, in newspapers and in personal appearances before the public, including appearances before the Council of the plaintiff stated that if the plaintiff installed its traps that the State of Alaska would seize them, arrest the persons who installed and maintained them, and take such other actions as he deemed appropriate to the alleged violation of law; these threats were also made by agents of the defendant William A. Egan acting on his behalf directly to the plaintiff's council on a number of occasions and to the attorneys retained to represent the plaintiff's interests; that on or about the 15th day of June, 1959, plaintiff set one of its trap frames at its site at Pybus Point, and thereafter the defendant William A. Egan carried out his threat and caused the law enforcement officers of the State of Alaska to arrest the President of the Council of the plaintiff and the foreman of the crew that set the trap, and caused informations to be filed against them in this Court, and further that said trap has been seized and possessed by these law enforcement officials acting under direct authority of said defendant William A. Egan.

IX.

That the action heretofore taken by the said defendant and his agents, and the action threatened to be taken is

wrongful and in violation of the laws of the United States of America, and in violation of the Constitution of the United States of America, and in violation of the Constitution of the State of Alaska, for the following reasons, and such other reasons as will be brought forth at trial [fol. 11] of this cause, to-wit:

1. That the laws of the United States of America prevent the State of Alaska, or any officer or agent thereof from exercising any control over the supervision and management of the fish and wildlife in Alaska at this time (Section 6e Statehood Act, 72 Stat. 339, Section 6e).
2. That the laws of the United States of America (Section 4 Statehood Act, 72 Stat. 339, Sec. 4) and the Constitution of the State of Alaska (Article 12, Section 12) prevent the State of Alaska from interfering with the control and management of Indian fishing rights held either by Indians or held by the United States of America in trust for Indians, at any time, now or in the future.
3. The regulations issued by the Secretary of the Interior (24 F.R. 2053, et seq.) March 7, 1959, allowing the plaintiff to operate and utilize four fish traps at the sites noted hereinabove constitute an exercise by the United States of its exclusive power both over the whole Alaska fisheries and over the fishing rights of Indians.
4. The commerce clause of the Constitution of the United States of America places the regulation of the social and economic welfare of Indians as well as the regulation of fish and wildlife resources of the United States exclusively within the power of Congress of the United States.
5. That the statute under which defendant claims his authority (17 SLA 1959), the claimed constitutional mandate (Ordinance #3), and the general claim of [fol. 12] police power are all repugnant to the principles and laws above stated and therefore are in violation of the laws of the United States, the Constitution

of Alaska and Constitution of the United States of America and are therefore void and of no force and effect.

X.

That unless the Court prevents the defendant from so doing by its power of injunction, the defendant will cause his agents and law enforcement officials to seize the plaintiff's traps, arrest the people employed by plaintiff to erect and maintain said traps, every time the plaintiff seeks to place and fish such trap or traps pursuant to the regulations issued by the Secretary of Interior as above mentioned; all to the irreparable harm and damage of plaintiff as below set forth.

XI.

That the wrongful seizure of plaintiff's traps and arrest of plaintiff's employees engaged in setting and maintaining said traps will result in irreparable harm and damage to the plaintiff as follows: That if the plaintiff is unable to use the four traps that it has made ready to locate at sites approved by the Secretary of the Interior, the traps will become valueless to the plaintiff with a loss to the plaintiff of about \$100,000.00, which figure includes only the physical value; that 45% of the plaintiff's canned salmon production is based on trap caught salmon, and that without the use of these four traps plaintiff would be forced to drastically curtail its operation, quite likely to the point of complete shutdown; that plaintiff cannot convert to an operation completely supported by a seine fleet because (1) there are no boats available either in Alaska or in the other States (2) if boats were available there are no trained [fol. 13] crews to man them; (3) plaintiff has neither the funds nor source of funds to acquire such a fleet, if one was available; such curtailment or closure of the cannery would result in direct loss to the plaintiff of the value of the cannery and equipment which has no value other than that of a salmon cannery, in the amount of \$377,000.00 and would result in plaintiff being unable to retire its current obligation of \$781,000.00 to the United States, and would result in a payroll loss to the 70 to 100 employees of plain-

tiff (members of plaintiff corporation) of about \$50,000.00 to \$65,000.00, and would result in the loss to the plaintiff of 30% of the net profits of the cannery that go to its members for community advancement and improvement; that none of these direct losses can be recovered from the State of Alaska under the terms of 170 SLA 1957; that the only employment available now, and historically, to the members of the plaintiff corporation at Kake, Alaska, is in the cannery or on plaintiff's seine boats and trap servicing vessels; that this employment though of short duration constitutes the sole source of income for the calendar years for almost all of plaintiff's members; that the closure of plaintiff's cannery, or curtailment to the point where it could operate would completely wipe out the economic base of the plaintiff's members, and leave the village of Kake with no means of self support and entirely dependent upon relief dole and welfare aid; that the harm and damage that will accrue to the plaintiff and to its members thereby is beyond all calculation and extends to the very fiber of their social, economic and cultural well being, for which no measure of money damage can be fixed.

XII.

That the commercial salmon fishing season at plaintiff's trap sites commences 6:00 o'clock A. M., Wednesday, the 24th day of June, 1959; that it is necessary that the trap [fol. 14] frames and related gear be placed at the sites and made ready for operation prior to the opening time in order that no fishing time will be lost; that the season closes on the 22d of August, 1959, at 6:00 o'clock P. M. and the time lost at the opening of the season cannot be added on to the end thereof; that if plaintiff places its traps in position the defendant will cause his agents and officials to seize the traps and arrest the people involved unless restrained by order of this Court; and that for that reason it is necessary that defendant and his agents be restrained from interfering in any way with the advance placing and setting of said traps at said sites.

XIII.

That it is necessary that a temporary restraining order without notice issue upon the filing of this complaint, as prayed for herein, in order to preserve the status quo of plaintiff's rights pending the hearing on the prayer and motion for a preliminary injunction because unless restrained the defendant and his agents will make the seizures and arrests herein referred to and thereby accomplish the very wrongful act that plaintiff is seeking to restrain before a hearing can be had on this complaint for an injunction, and that as alleged herein in Paragraph XII it is necessary that plaintiff set its traps as soon as possible if it is to avoid the irreparable damage and loss that it seeks by this petition to avoid; and that the very irreparable harm and damage and loss alleged in Paragraph XI herein will take place in large part during the time that elapses from the filing of this complaint and a determination on the prayer for a preliminary injunction unless defendant is so restrained.

XIV.

That the defendant has already caused the seizure of one of plaintiff's traps located at Point Pybus and has ousted plaintiff of possession; that this trap normally accounts for [fol. 15] 50% of the plaintiff's trap caught fish production; that during the first 10 days of the season this trap normally catches about one-third ($\frac{1}{3}$) of its total production; that the season opens 6:00 A. M. Wednesday, June 24, 1959; that the very irreparable harm plaintiff is seeking to have prevented pending a hearing on the merits will in an appreciable measure take place if this trap is left in the possession of the defendant until the conclusion of this suit; that if plaintiff's rights are to be preserved and the status quo maintained pending a final determination in this matter, it is essential that this trap be returned to the plaintiff forthwith; plaintiff has no other trap to utilize in its place, and the only area at Point Pybus plaintiff can use under the Secretary of the Interior's regulations is the area now occupied by the trap held by the defendant's agents.

XV.

That the plaintiff has no plain, speedy or adequate remedy at law to prevent the unlawful action of the defendant and his agents.

Wherefore, plaintiff prays as follows: That the defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the following sites:

(1) Kake-Cape Fanshaw, located at 57° 10' 52" N. lat. 133° 32' 44" W. long.

(2) Kake-Point Pybus, located at 57° 18' 40" N. lat. 133° 57' 21" W. long.

(3) Kake-Point Macartney, located at 57° 01' 23" N. lat. 134° 02' 50" W. long.

(4) Kake-Cornwallis, located at 56° 55' 52" W. lat. 134° 16' 08" W. long.

[fol. 16] and that defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described and that pending the filing of an answer and the hearing and determination of this action that a preliminary injunction restraining the defendant, his agents, successors, deputies, servants, and employees and all persons acting by or through or under him from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the sites listed hereinabove and from

in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and further that pending the hearing thereof that a temporary restraining order issue restraining the defendant, his agent, successors, deputies, servants and employees, and all persons acting by or through or under him from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the above mentioned sites, and from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and [fol. 17] further that the defendant, his agents, servants and employees be ordered to deliver up possession to the plaintiff forthwith that certain trap fishing structure seized by the defendant's agent situate at Point Pybus, Alaska, and for such other and further relief as to the Court seems meet and equitable.

Dated at Ketchikan, Alaska, this 22d day of June, 1959.

R. L. Jernberg, C. L. Cloudy, Attorneys for Plaintiff.

Duly sworn to by Ernest Williams, Sr., jurat omitted in printing.

[fol. 18]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8063A

THE ORGANIZED VILLAGE OF KAKE, ALASKA, Plaintiff,

vs.

WILLIAM A. EGAN, as Governor of the
State of Alaska, Defendant.AFFIDAVIT OF ERNEST WILLIAMS, SR., IN SUPPORT OF
COMPLAINT FOR A TEMPORARY RESTRAINING ORDERState of Alaska)
Ketchikan Precinct) ss:Ernest Williams, Sr., being first duly sworn, deposes and
says:

1. That the plaintiff, the Organized Village of Kake, Alaska, is a Federal chartered Indian Corporation under the Indian Reorganization Act of June 18, 1934, as amended, and that its charter was duly approved by the Secretary of the Interior and ratified by the members of the association.

2. That affiant is the president of the council, the governing body of said Organized Village of Kake, Alaska, and is duly authorized by said council to make this affidavit.

3. That the Organized Village of Kake, Alaska, is located on the west coast of Kupreanof Island, approximately 100 miles southerly from Juneau, Alaska. That the community has a population of 400 persons, all of whom are Native Alaska Indians of the Thlinget tribe. That the entire adult population is wholly dependent upon the salmon fishery, as primary fishermen, and workers in and about the salmon
[fol. 19] cannery at Kake, Alaska.

4. The United States is the owner of the Kake cannery and the Organized Village of Kake, Alaska, is the beneficial owner thereof, its buildings, machinery, equipment, and floating fish traps.

5. That the United States, as aforesaid, is the owner of all of said cannery and fish traps, by virtue of a conveyance to the United States, in trust for the Organized Village of Kake, from P. E. Harris and Company, on February 10, 1950, and owner of the War Department and Forest Service permits for said traps.

That, by virtue of a purchase loan agreement, the United States has required the Organized Village of Kake to reimburse it for the cost of said cannery, equipment and fish traps, plus additional loans and advances made since 1950. That the earnings of the Kake cannery are handled under the supervision of the United States, and are distributed as follows: Debt retirement, funding for operations, reserve for depreciation and improvements, for social, educational and relief purposes, and dividends to members, provided the Organized Village of Kake is not indebted to the United States. That 25% of the net profits from the cannery operations, before costs of administration are paid, are given to Kake for public works and other improvements in the village; and 5% of the net profits from said cannery operations, before costs of administration are paid, are allocated to Kake seine fishermen supplying fish to the cannery.

That under the loan agreement above described, the Organized Village of Kake is presently indebted to the United States in the sum of \$781,872.33 which includes the sum of approximately \$48,000 advanced by the United States for [fol. 20] the installation of the four fish traps for the 1959 fishing season.

6. That the Secretary of the Interior, the Honorable Fred A. Seaton, during the latter part of 1958 assured the Village of Kake it could install floating fish traps, and by virtue of this and other official releases and notices preparations were made for the 1959 season, including the borrowing of money from the United States for the purchase of materials for the traps. That on March 19, 1959, the Secre-

tary of the Interior issued a regulation in the Federal Register, numbered 115.26, stating that

"Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(b) Organized Village of Kake

(1) Kake-Cape Fanshaw, located at 57°10'52" N. lat. 133°32'44" W. long.

(2) Kake-Point Pybus, located at 57°18'40" N. lat. 133°57'21" W. long.

(3) Kake-Point Macartney, located at 57°01'23" N. lat. 134°02'50" W. long.

(4) Kake-Cornwallis, located at 56°55'52" N. lat. 134°16'08" W. long.

7. That the money invested in equipping the four traps, as mentioned in paragraph 5 above, if the Village of Kake is deprived the use of the traps, cannot be recovered. That the traps are made up and readied for operation, and the materials therein would be rendered valueless if the traps had to be dismantled, as the components, such as wire mesh, webbing, labor, etc., would be unsalvageable. In addition thereto there will be not less than a 45% loss of production of fish which cannot otherwise be recovered. All available seine boats have been utilized in the past, and it is quite unlikely there would be any substantial increase in their catches. There is a great lack of seine boats in Alaska, and none could be built or manned within the brief time re-[fol. 21] maining before the season opens. That the loss of use of traps means fewer cases of salmon will be produced, and the cannery, which is practically the sole means of support for the Kake natives, will be forced to cut employment. That the loss of production normally enjoyed from the traps could conceivably result in a partial or complete closure of the cannery. That there is no provision in law for the extension of the salmon fishing season whereby the Kake Organized Village, if the said fish traps are not allowed to fish with the result the production would be de-

pendent upon the catches from the members' 16 seine boats, could possibly recapture the loss the banning of said traps would create.

8. That on or about June 5, 1959, the State of Alaska notified the Organized Village of Kake that it could not install or operate the fish traps above mentioned, and that it would arrest and attempt to obtain the conviction of anyone who attempted to install said traps under an alleged criminal statute of the State of Alaska; and, that on June 17, 1959, the Organized Village of Kake, pursuant to the authority granted by the Congress of the United States, the Secretary of the Interior, the Statehood Act and the Constitution of Alaska, attempted to moor a trap at Pybus Point, Alaska, and was prevented from doing so by seven or more fish and game agents, tax collector, or state police (all of whom affiant believes were agents and representatives of the State of Alaska and its Governor), when said officials placed affiant under arrest on the charge of violating Chapter 17, Session Laws of Alaska, 1959, which criminal charge affiant is informed is pending in the District Court at Juneau; and, that immediately following said arrest of affiant said officers took possession of said trap and have retained possession thereof continuously since June 17, 1959.

That the aforesaid threatened action by the State of [fol. 22] Alaska and the aforesaid arrest of affiant and seizure, has interfered with the fishing rights of the Organized Village of Kake and has prevented and will prevent the installation and operation of its fish traps, all of which has caused the Organized Village of Kake irreparable injury and damage for which there is a lack of legal remedy, as affiant verily believes.

9. That the Indian Reorganization Act of June 18, 1934, as applied to Alaska and to the plaintiff, has looked toward the creation of a solid fishing economy benefiting the Indians and the members of the plaintiff corporation; that it has been applied through use of the cooperative fishing and processing venture in an effort to raise the standard of living above that of a mere subsistence level; that the choice of creating a solid fishing economy, over that of some

other type of economy was determined by the physical location of plaintiff's village, the resources available to it, and the capacities and capabilities of its members; that no other economic base has been established nor has any type of economic base appeared available and suitable to our needs or abilities; that the members of the plaintiff corporation are incapable, through no fault of their own, of finding and placing in operation a substitute base of economy; that it is the understanding of myself and the members of the plaintiff corporation that the decision of the Secretary of the Interior to allow the plaintiff to utilize the trap sites herein involved was based (in addition to legal principles) upon a continuing fulfillment of a plan to create a sound fishing economy for us; that the loss of these trap sites and the right to fish them and the resultant closure of our cannery (or the curtailing of operation to a point where its benefits become insignificant) operation will wipe out all advances we have made toward establishing ourselves within a strong social and economic framework of living and will leave us with no avenue of escape from a lifetime of dependence upon public relief.

[fol. 23] 10. That the State of Alaska will suffer no damage from the granting of a temporary restraining order.

Ernest Williams, Sr.

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska,
My commission expires: April 29, 1961.

(Seal)

[fol. 24]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

Civil Action File No. 8063A

THE ORGANIZED VILLAGE OF KAKE ALASKA, Plaintiff,

vs.

WILLIAM A. EGAN, as Governor of the
State of Alaska, Defendant.AFFIDAVIT OF J. D. THOMPSON IN SUPPORT OF MOTION
FOR TEMPORARY RESTRAINING ORDERState of Alaska)
Ketchikan Precinct) ss:

J. D. Thompson, being first duly sworn, on oath deposes and says:

1. That he is the manager of the cannery for the Organized Village of Kake which is located at Kake, Alaska, and does business under the name and style of Keku Canning Company. That he has been connected with said cannery for the Organized Village of Kake since 1956. That in his capacity as manager he has charge and custody of all the records of said cannery and has personal knowledge thereof, and of matters transpired and existing between Kake and the United States.

2. That the United States on February 15, 1950, purchased from P. E. Harris and Company the cannery at Kake which included lands, buildings, machinery, equipment, floating equipment, supplies, fish traps, fish trap sites, rights, privileges and appurtenances, in trust for the Organized Village of Kake.

That the United States paid the sellers the sum of [fol. 25] \$363,360.49 for the above mentioned properties, and Kake entered into a purchase loan agreement with the

United States whereby the latter would be reimbursed out of cannery earnings, together with interest at the rate of 2% per annum. That the United States also agreed to finance Kake's operation of said cannery, and has done so annually since 1950, and the total indebtedness of Kake to the United States is presently \$781,872.33. That the present value of said properties is \$377,218.45.

That Kake has been preparing for the 1959 salmon season since the winter and spring of 1958-59, including the purchase of materials and labor to ready Kake's four (4) floating fish traps for the season, which opens on June 24, 1959. That the money so expended on said fish-traps has been advanced by the United States under said loan agreement, and amounts to approximately \$50,000, which Kake is obligated to repay.

That the disbursement of all funds by Kake is subject to prior authorization being given by the United States, and the United States retains and exercises supervisory authority over all transactions respecting said cannery. That the employment of counsel in this case was made upon the approval of the Secretary of the Interior.

That the value of the trap frames, anchors, and gear, ready to fish, is approximately \$25,000 each, or a total of \$100,000 for the four traps involved. That the salvage value, if the native traps are abolished, would be almost nothing, due to the fact there is no other use for them besides fishing, and non-native traps have been banned, thereby eliminating the market for such gear. The wire mesh, cables, webbing, nails, bolts, staples and appurtenances would not be salvageable, and the remaining parts, namely, the logs and anchors, would be of little value.

That, while the factors may vary with each annual salmon season, generally it is necessary to can about 35,000 cases before the cannery can expect a profit. That in order to reach even a goal of 35,000 cases intensive fishing by a large amount of fish catching gear, is required.

That during the 1958 season approximately 45% of the cannery pack was produced by its four floating fish traps, and 55% was produced by the seine boats. That the elimination of the four traps would require, according to the experience of 1958, about 12 additional seine boats. That

seine boats cost between \$30,000 and \$60,000 each, and according to affiant's understanding seine boats are unavailable either in Alaska or in the Puget Sound area, and if they were it is common knowledge that experienced fishermen are not. That while the United States has and does make loans to Kake for cannery operations, it does not authorize the purchase, and has specifically prohibited the purchase of seine boats. That affiant believes the financial condition of the cannery is such that there are no sources of financing available to it for this purpose.

That the Organized Village of Kake is the permittee of the U. S. Forest Service, which permits it to use certain of the Tongass National Forest lands for tailholds for said fish traps. That, also, Kake has been licensed by the U. S. Corps of Engineers to moor and install fish traps in the navigable waters.

That the Organized Village of Kake is and has been immune from raw fish taxes, and fish trap license taxes which were imposed on non-native fish trap operators by the Territory of Alaska, and the new State of Alaska, by virtue of Kake's status as an instrumentality of the United States. That the Territory of Alaska, and the now State of Alaska, has never regulated or attempted to regulate fish traps.

That Kake in the operation of said fish traps has abided by all conservation directives of the U. S. Fish & Wildlife Service, and in 1953 it voluntarily reduced its trap production by 50%.

[fol. 27] That the population of Kake is approximately 400, all of whom are members of the plaintiff corporation; that the entire community is dependent upon fishing; that approximately 50 women and 10 men are employed in the cannery during the canning season; that 25 men are employed in pre-season work on fish traps and the cannery; that the Kake fishermen operate 23 seine boats serving the cannery, and the community's lessee operates 20 seine boats; that the number of Kake members involved in seining is 115, or 175 Kake members in all are identified with the cannery operations. That the cannery workers receive approximately \$75,000 annually in wages, and the seine fishermen receive about \$115,000 annually.

That the elimination of the four traps would obviously critically reduce production of canned salmon, and, as the manager for the Kake cannery, affiant could not recommend operation of the cannery with only 23 seine boats, based on experience of the past several seasons. That the result of closure would be the loss of employment and income, community improvements, and of more importance the interest and desire for betterment that the Kake Indians have developed from their beneficial ownership of and participation in the affairs of the cannery.

That on April 6, 1959, the cannery, as it is required so to do, notified the U. S. Bureau of Commercial Fisheries that it would install for operation during the 1959 salmon fishing season its four fish traps, under the authority granted by the Secretary of the Interior, as set forth in the Federal Register for March 19, 1959, at page 2069.

That the four floating fish traps are ready to be moved to said sites and to fish on June 24, 1959, however, the Organized Village of Kake and affiant have received notice officially and through news media that the State of Alaska [fol. 28] would prevent fishing by traps by filing criminal charges; and, that affiant has knowledge of the occurrences involving the Pybus Point trap, installed by the Organized Village of Kake, wherein the State of Alaska on June 17, 1959, arrested the president of the village council and others for alleged violations of a state law prohibiting the installation of traps.

That during my tenure as cannery manager at Kake, I have read and have knowledge of each annual issue of the commercial fishery regulations promulgated by the Secretary of the Interior, and the 1959 regulations contained the first reference, to my knowledge, to regulations relating to native fish traps.

J. D. Thompson

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska.
My commission expires: April 29, 1961.

(Seal)

[fol. 29]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE, AT KETCHIKAN

Civil Action File No. 8064A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

vs.

WILLIAM A. EGAN, as Governor of the
State of Alaska, Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF—June 22, 1959

Comes now the plaintiff and for cause of suit alleges:

I.

That the plaintiff is a Federal corporation, chartered as an organized Indian village under the laws of the United States of America, which charter was ratified according to law under date of November 15, 1939, and is authorized by said charter to sue and be sued in courts of competent jurisdiction. That said village is located at Angoon, Alaska; that said corporation is a membership corporation whose membership is that of the entire village; presently numbering 306 people; that the members thereof are of the Thlinget Indian Tribe; that the United States Department of Interior has authorized the institution of this suit by the plaintiff and the retention of counsel by the plaintiff for that purpose.

II.

That in March, 1948, plaintiff commenced doing business as Hood Bay Salmon Company after the United States of America acquired title in its own name as trustee for the plaintiff to certain salmon cannery property located on U. S. S. 1480, Hood Bay, Alaska, including, but not limited to, cannery buildings, canning equipment, ware-

[fol. 30] houses, docks, floats, outbuildings, boats, four fish trap sites and the assignment of War Department Permits therefor, four "tailhold" and "watchman cabin" sites and assignment of United States Forest Service Use Permits therefor, trap brailing tenders, trap setting tenders and rigging scows and all other equipment normally associated with the acquisition and processing of fish caught by a floating fish trap. That said purchase and acquisition was by the United States of America acting through the Department of Interior and the Acts of Congress, and pursuant thereto the funds necessary to accomplish said acquisition were supplied by the United States of America in the amount of \$260,000.00, and said property has a present day book value of \$207,000.00.

III.

That since March, 1948, plaintiff has, as beneficial owner, to the date of this complaint, continuously operated its cannery and fished its trap sites (during seasons prescribed by law) in pursuit of the purposes for which it was organized as a federal chartered Indian corporation, with the exception that during the past few years of declining salmon runs, the plaintiff has, as a party to a general agreement among the salmon industry in Alaska, restricted its use of its sites so as to use less than all of the four sites from year to year.

IV.

That since March, 1948, the funds for operation of said cannery, setting and fishing of the traps, etc., have been supplied by the United States of America; that, during this period the plaintiff has paid no tax to the Territory of Alaska based upon operation of fish traps or the packing of salmon for commercial purposes by reason of the fact that it claimed exemption as a federal chartered Indian corporation, an instrumentality of the federal government, and therefore exempt from taxation by the Territory.

[fol. 31]

V.

That the operation of the cannery and utilization of the fish trap sites mentioned was undertaken by the plaintiff

for the purpose of furnishing employment for the members of the Angoon Community Association to provide a means of allowing them to have their social and welfare needs advanced through use of profits obtained from the operation, all designed to promise the advancement of the people of the said Community in a manner compatible with the intention of the Congress of the United States to care and provide for the social and economic welfare of the Indian.

VI.

That on or about November 14, 1958, the Secretary of the Interior published in the Federal Register (23 F.R. 8874) a notice that he intended to amend the then existing regulations governing fishing for or taking species of commercial fish and shellfish in the waters of Alaska, and that it was proposed to prohibit the taking of fish in Alaska waters by use of fish traps except insofar as certain Indian tribes or villages were concerned; that on March 7, 1959, the said Secretary of Interior published his amendments to the fishing regulations in 24 F.R. 2053, and therein prohibited the taking of fish in Alaska waters by use of fish traps, except that such taking would be allowed with respect to trap sites owned, among others, by the Angoon Community Association, plaintiff herein, therein described as follows:

- (1) Angoon-Basket Bay, located at 57°26'16" N. lat. 134°51'34" W. long.
- (2) Angoon-Eagle Island, located at 57°22'28' N. lat. 134°34'18" W. long.
- (3) Angoon-Point Caution, located at 57°13'152" N. lat. [fol. 32] 134°39'05" W. long.

VII.

That on or about March 10, 1959, Elmer Bennett, the then acting Secretary of the Interior advised James E. Hawkins, Area Director, Alaska Native Service, Juneau, Alaska, that pursuant to the disclaimer of Indian fishing rights made by the State of Alaska, upon admission to

the Union, and pursuant to the long-standing supervisory control exercised by the United States for the protection of the Indians, the regulations for fishing in Alaska for 1959 would permit the operation of traps by the plaintiff (among others) and that therefore the plaintiff (among others) could proceed to make plans for operation of their salmon canneries in 1959 on the basis that they would be allowed to continue the use of such traps as designated by the Secretary; that this information was transmitted by James E. Hawkins to the plaintiff herein under date of March 16; that pursuant to the information therein contained the plaintiff then undertook to ready itself to operate its cannery for the 1959 season based upon the operation of three trap sites; that pursuant thereto, plaintiff notified the Acting Regional Director of the Bureau of Commercial Fisheries, Juneau, Alaska, under date of April 1, 1959, the plaintiff was going to operate the three above described trap sites.

VIII.

That on or about May 21, 1959, the defendant, William A. Egan as Governor for the State of Alaska made public his intent to seek enforcement of a Statute of the State of Alaska, identified as 17 SLA 1959, stating that said statute prohibited the use of fish traps in Alaska, and that it made it a crime subject to fine and imprisonment to violate the provisions thereof and stating further that the third ordinance of the Constitution of Alaska prohibit the plaintiff's use of fish traps, and that the police power of the State of Alaska prohibited said use; thereafter the said defendant on numerous occasions, in newspapers and in personal appearances before the public, including appearances before the Council of the plaintiff stated that if the plaintiff installed its traps that the State of Alaska would seize them, arrest the persons who installed and maintained them, and take such other actions as he deemed appropriate to the alleged violation of law; these threats were also made by agents of the defendant William A. Egan acting on his behalf directly to the plaintiff's council on a number of occasions and to the attorneys retained to

represent the plaintiff's interests; that on or about the 15th day of June, 1959, The Organized Village of Kake, Alaska d/b/a Keku Canning Company, set one of its trap frames at a site allotted to it by the Secretary of the Interior at Pybus Point, Alaska, and thereafter the defendant, William A. Egan, carried out his threat and caused the law enforcement officers of the State of Alaska to arrest the President of the Council of said Organized Village of Kake, Alaska, and the foreman of the crew that set the trap, and caused informations to be filed against them in this Court, and further that said trap has been seized and possessed by these law enforcement officials acting under direct authority of said defendant William A. Egan.

IX.

That the action heretofore taken by the said defendant and his agents, and the action threatened to be taken is wrongful and in violation of the laws of the United States of America, and in violation of the Constitution of the United States of America, and in violation of the Constitution of the State of Alaska, for the following reasons, and such other reasons as will be brought forth at trial of this cause, to-wit:

1. That the laws of the United States of America prevent the State of Alaska, or any officer or agent thereof from exercising any control over the super-[fol. 34] vision and management of the fish and wildlife in Alaska at this time (Section 6e Statehood Act, 72 Stat. 339, Section 6e).

2. The laws of the United States of America (Section 4 Statehood Act, 72 Stat. 339, Sec. 4) and the Constitution of the State of Alaska (Article 12 Section 12) prevent the State of Alaska from interfering with the control and management of Indian fishing rights held either by the Indians or held by the United States of America in trust for Indians, at any time, now or in the future.

3. The regulations issued by the Secretary of Interior (24 F.R. 2053, et seq.) March 7, 1959, allowing

the plaintiff to operate and utilize three fish traps at the sites noted hereinabove constitute an exercise by the United States of its exclusive power both over the whole Alaska Fisheries and over the fishing rights of Indians.

4. The commerce clause of the Constitution of the United States of America places the regulation of the social and economic welfare of Indians, as well as the regulation of fish and wildlife resources of the United States exclusively within the power of Congress of the United States.

5. That the statute under which defendant claims his authority (17 SLA 1959), the claimed constitutional mandate (Ordinance #3), and the general claim of police power are all repugnant to the principles and laws above stated and therefore are in violation of the laws of the United States, the Constitution of Alaska and Constitution of the United States of America and are therefore void and of no force and effect.

[fol. 35]

X.

That unless the Court prevents the defendant from so doing by its power of injunction, the defendant will cause his agents and law enforcement officials to seize the plaintiff's traps, arrest the people employed by plaintiff to erect and maintain said traps, every time the plaintiff seeks to place and fish such trap or traps pursuant to the regulations issued by the Secretary of Interior as above mentioned; all to the irreparable harm and damage of plaintiff as below set forth.

XI.

That the wrongful seizure of plaintiff's traps and arrest of plaintiff's employees engaged in setting and maintaining said traps will result in irreparable harm and damage to the plaintiff as follows: That if the plaintiff is unable to use the three traps that it has made ready to locate at sites approved by the Secretary of the Interior, the traps will become valueless to the plaintiff with a loss to the plain-

tiff of about \$67,500.00, which figure includes only the physical value, that 30% of the plaintiff's canned salmon production is based on trap caught salmon, and that without the use of these three traps plaintiff would be forced to drastically curtail its operation, quite likely to the point of complete shutdown; that plaintiff cannot convert to an operation completely supported by a seine fleet because (1) there are no boats available either in Alaska or in the other states (2) if boats were available there are no trained crews to man them (3) plaintiff has neither the funds nor source of funds to acquire such a fleet, if one was available; such curtailment or closure of the cannery would result in direct loss to the plaintiff of the value of the cannery and equipment which has no value other than that of a salmon cannery, in the amount of \$207,000.00 and would result in plaintiff being unable to retire its current obligation of [fol. 36] \$848,000.00 to the United States, and would result in a payroll loss to the 70 to 100 employees of the plaintiff (members of the plaintiff corporation) of about \$50,000.00 to \$65,000.00, and would result in the loss to the plaintiff of 30% of the net profits of the cannery that go to its members for community advancement and improvement; that none of these direct losses can be recovered from the State of Alaska under the terms of 170 SLA 1957; that the only employment available now, and historically, to the members of the plaintiff corporation at Angoon Alaska, is in the cannery or on plaintiff's seine boats and trap servicing vessels; that this employment though of short duration constitutes the sole source of income for the calendar year for almost all of plaintiff's members, that the closure of plaintiff's cannery, or curtailment to the point where it could operate would completely wipe out the economic base of the plaintiff's members, and leave the community of Angoon with no means of self support and entirely dependent upon relief dole and welfare aid; that the harm and damage that will accrue to the plaintiff and to its members thereby is beyond all calculation and extends to the very fiber of their social, economic and cultural well being, for which no measure of money damages can be fixed.

XII.

That the commercial salmon fishing season at plaintiff's trap sites commences 6:00 o'clock A.M., Wednesday, the 24th day of June, 1959; that it is necessary that the trap frames and related gear be placed at the sites and made ready for operation prior to the opening time in order that no fishing time will be lost; that the season closes on the 22nd day of August, 1959, at 6:00 o'clock P.M., and the time lost at the opening of the season cannot be added on to the end thereof; that if plaintiff places its traps [fol. 37] in position the defendant will cause his agents and officials to seize the traps and arrest the people involved unless restrained by order of this Court; and that for that reason it is necessary that defendant and his agents be restrained from interfering in any way with the advance placing and setting of said traps at said sites.

XIII.

That it is necessary that a temporary restraining order without notice issue upon the filing of this complaint, as prayed for herein, in order to preserve the status quo of plaintiff's rights pending the hearing on the prayer and motion for a preliminary injunction because unless restrained the defendant and his agents will make the seizures and arrests herein referred to and thereby accomplish the very wrongful act that plaintiff is seeking to restrain before a hearing can be had on this complaint for an injunction, and that as alleged herein in Paragraph XII it is necessary that plaintiff set its traps as soon as possible if it is to avoid the irreparable damage and loss that it seeks by this petition to avoid; and that the very irreparable harm and damage and loss alleged in Paragraph XI herein will take place in large part during the time that elapses from the filing of this complaint and a determination on the prayer for a preliminary injunction unless defendant is so restrained.

XIV.

That the plaintiff has no plain, speedy or adequate remedy at law to prevent the unlawful action of the defendant and his agents.

Wherefore, Plaintiff prays as follows: That the defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from interfering in any manner with the right of the plaintiff to erect, moor, maintain, [fol. 38] operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the following sites:

(1) Angoon-Basket Bay, located : + 57°36'16" N. lat. 134°51'34" W. long.

(2) Angoon-Eagle Island, located at 57°22'28" N. lat. 134°34'18" W. long.

(3) Angoon-Point Caution, located at 57°13'52" N. lat. 134°39'05" W. long.,

and that defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described and that pending the filing of an answer and the hearing and determination of this action that a preliminary injunction restraining the defendant, his agents, successors, deputies, servants, and employees and all persons acting by or through or under him from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the sites listed hereinabove and from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described, and further that pending the hearing thereof that a restraining order issue restraining the de-

defendant, his agents, successors, deputies, servants and employees, and all persons acting by or through or under him be perpetually enjoined from interfering in any manner with the right of the plaintiff to erect, moor, maintain, operate and fish floating fish traps of the type allowed by the Secretary of the Interior of the United States of America at the above mentioned sites, and from in any manner attempting to enforce the provisions of 17 SLA 1959 or the provisions of any other law of the State of Alaska so as to prevent the plaintiff from operating said traps or so as to punish or penalize or prosecute plaintiff, its employees, agents or members for operating fish traps as above described. And that this Court declare 17 SLA 1959, the Third Ordinance of the Constitution of Alaska, and all other State laws relied upon by the defendant in support of his interference with plaintiff's right of fishery, void and of no force and effect insofar as their application extends to control, management, or restriction of plaintiff's right of fishery, and for such other and further relief as to the Court seem meet and equitable.

Dated at Ketchikan, Alaska, this 22d day of June, 1959.

R. L. Jernberg, C. L. Cloudy, Attorneys for Plaintiff.

Duly sworn to by Samuel G. Johnson, jurat omitted in printing.

[fol. 40]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8064A

 ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

 WILLIAM A. EGAN, as Governor of the State of Alaska,
 Defendant.

 AFFIDAVIT OF ALBERT THOMPSON, IN SUPPORT OF MOTION
 FOR TEMPORARY RESTRAINING ORDER

 State of Alaska)
) ss:
 Ketchikan Precinct)

Albert Thompson, being first duly sworn, on oath deposes and says:

1. That he is the manager of the cannery for the Angoon Community Association, which is located at Hood Bay, Alaska, and does business under the name and style of Hood Bay Salmon Company. That he has been in charge of said cannery for the association since 1948. That in his capacity as manager he has charge and custody of all the records of said cannery and has personal knowledge thereof; and of matters transpired and existing between the Association and the United States.

2. That the United States on March 24, 1948, purchased from August Buschmann, H. A. Fleager and Arthur P. Wolf the cannery at Hood Bay, which included lands, buildings, machinery, equipment, floating equipment, supplies, fish traps, fish trap sites, rights, privileges and appurtenances, in trust for the Angoon Community Association.

That the United States paid the sellers the sum of \$260,000 for the above mentioned properties, and the Association entered into a purchase loan agreement with the United States whereby the latter would be reimbursed out of cannery earnings, together with interest at the rate

of 2% per annum. That the United States, also agreed to finance the Association's operation of said cannery, and has done so annually since 1948, and the total indebtedness of the Association to the United States is presently \$848,446.91. That the present value of said properties is \$207,096.13.

That the Association has been preparing for the 1959 salmon season since the winter and spring of 1958-59, including the purchase of materials and labor to ready the Association's three (3) floating fish traps for the season which opens on June 24, 1959. That the money so expended on said fish traps has been advanced by the United States under said loan agreement, and amounts to approximately \$30,000 which the Association is obligated to repay.

That the disbursement of all funds by the Association is subject to prior authorization being given by the United States, and the United States retains and exercises supervisory authority over all transactions respecting said cannery. That the employment of counsel in this case was made upon the approval of the Secretary of the Interior.

That the value of the trap frames, anchors, and gear, ready to fish, is approximately \$22,500 each, or a total of \$67,500 for the three traps involved. That the salvage value, if the native traps are abolished, would be almost nothing, due to the fact there is no other use for them besides fishing, and non-native traps have been banned, thereby eliminating the market for such gear. The wire mesh, cables, webbing, nails, bolts, staples and appurtenances would not be salvageable, and the remaining parts, namely, the logs and anchors, would be of little value.

[fol. 42] That, while the factors may vary with each annual salmon season, generally it is necessary to can about 32,000 cases before the cannery can expect a profit. That in order to reach even a goal of 32,000 cases intensive fishing by a large amount of fish catching gear is required. That during the 1958 season approximately 28% of the Association's pack was produced by its three floating fish traps, and 72% was produced by the members' 16 seine boats. That the elimination of the three traps would require, according to the experience of 1958, about 9 additional seine boats. That seine boats cost between \$30,000 and \$60,000 each, and according to Affiant's understanding

seine boats are unavailable either in Alaska or in the Puget Sound area, and if there were it is common knowledge that experienced fishermen are not. That while the United States has and does make the Association loans for cannery operations, it does not authorize the purchase, and has specifically prohibited the purchase of seine boats. That affiant believes the financial condition of the cannery is such that there are no sources of financing available to it for this purpose.

That the Angoon Community Association is the permittee of the U. S. Forest Service, which permits said Association to use certain of the Tongass National Forest lands for tailholds for said fish traps. That, also, the Association has been licensed by the U. S. Corps of Engineers to moor and install fish traps in the navigable waters.

That the Association is and has been immune from raw fish taxes and fish trap license taxes which were imposed on non-native fish trap operators by the Territory of Alaska, and the now State of Alaska, by virtue of the Association's status as an instrumentality of the United States. That the Territory of Alaska, and the now State of Alaska, has never regulated or attempted to regulate fish traps.

[fol. 43] That the Association in the operation of said fish traps has abided by all conservation directives of the U. S. Fish & Wildlife Service, and the Association in 1953 voluntarily reduced its trap production capacity by 50%.

That the population of Angoon is approximately 306, all of whom are members of the plaintiff corporation, and each year men, women and children migrate from their village to the cannery at Hood Bay, where individual quarters and family dwellings are provided them. That pre-season preparations of the traps and cannery creates employment of about 20 men; that during the season about 14 men and 64 women are employed in the cannery, and about 80 men are working on seine boats. That the wages earned by cannery employees approximate \$75,000 annually, and the earnings from the cannery and fishing provides all of the income these natives enjoy.

That the elimination of the three traps would obviously critically reduce production of canned salmon, and as the

manager for the Association affiant could not recommend operation of the cannery with 16 seine boats, based on experience of the past several seasons. That the result of closure would be the loss of employment and income, community improvements and of more importance the interest and desire for betterment that the Angoon Indians have developed from their beneficial ownership of and participation in the affairs of the Hood Bay cannery.

That on April 6, 1959, the cannery, as it is required so to do, notified the U. S. Bureau of Commercial Fisheries that it would install for operation during the 1959 salmon fishing season the following named fish traps, Point Caution #1, Eagle Island #2, and Basket Bay #3, under the authority granted by the Secretary of the Interior, as set forth in the Federal Register for March 19, 1959, at page 2069.

[fol. 44] That the floating fish traps above mentioned are ready to be moved to said sites and to fish on June 24, 1959, however, the Association and affiant have received notice officially and through news media that the State of Alaska would prevent fishing by traps by filing criminal charges; and, that affiant has knowledge of the occurrences involving the Pybus Point trap, installed by the Organized Village of Kake, wherein the State of Alaska, on June 17, 1959, arrested the president of the village council and others for alleged violations of a state law prohibiting the installation of traps.

That during my tenure as cannery manager for the Angoon Community Association, which commenced in 1948, I have read and studied each annual issue of the commercial fishery regulations promulgated by the Secretary of the Interior, and the 1959 regulations contained the first reference, to my knowledge, to regulations relating to native fish traps.

Albert Thompson

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska, My commission expires: April 29, 1961.

(Seal)

[fol. 45]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action File No. 8064A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, as Governor of the State of Alaska,
Defendant.

AFFIDAVIT OF SAMUEL G. JOHNSON IN SUPPORT OF
COMPLAINT FOR A TEMPORARY RESTRAINING ORDER

State of Alaska)
) ss:
Ketchikan Precinct)

Samuel G. Johnson, being first duly sworn, deposes and says:

1. That the plaintiff, the Angoon Community Association, is a Federal Chartered Indian Corporation under the Indian Reorganization Act of June 18, 1934, as amended, and that its charter was duly approved by the Secretary of the Interior and ratified by the members of the association.

2. That affiant is and has been since 1948, the president of the council, the governing body of said Angoon Community Association, and is duly authorized by said council to make this affidavit.

3. That the Angoon Community Association is located at Angoon, Alaska, which is situate on the west coast of Admiralty Island, approximately 75 miles southwesterly from Juneau, Alaska. That the community consists of 306 persons, all of whom are native Alaska Indians of the Tlinget tribe, and of whom 166 are adults and the re-[fol. 46] mainder are children. That the entire adult population is wholly dependent upon the salmon fishery, as

primary fishermen and workers in and about the salmon cannery at Hood Bay, Alaska, a few miles southerly of Angoon. That each salmon season the entire population (excepting 22 aged and infirm natives), men, women and children, move from their homes at Angoon to the Hood Bay Cannery for the season's work, which is normally the three summer months.

4. The United States is the owner of the Hood Bay Cannery and the Angoon Community Association is the beneficial owner thereof, its buildings, machinery, equipment vessels, floating fish traps.

5. That the United States, as aforesaid, is the owner of all of said cannery and fish traps, by virtue of a conveyance to the United States, in trust for the Angoon Community Association, from August Buschmann, H. A. Fleager and Arthur P. Wolf, on March 24, 1948, and owner of the War Department and Forest Service permits for said traps. That, by virtue of a purchase loan agreement, the United States has required the Angoon Community Association to reimburse it for the cost of said cannery, equipment and fish traps, plus additional loans and advances made since 1948. That the earnings of the Hood Bay cannery are handled under the supervision of the United States, and are distributed as follows: Debt retirement, funding for operations, reserve for depreciation and improvements, for social, educational and relief purposes, and dividends to members, provided the Association is not indebted to the United States. That 25% of the net profits from the cannery operations before costs of administration are paid, are given to the Association for public works and other improvements in the Angoon village; and 5% of the net profits from said cannery operations, before costs of administration are paid, are allocated to the Association seine fishermen supplying fish to the cannery.

[fol. 47] That under the loan agreement above described, the Angoon Community Association is presently indebted to the United States for the sum of \$848,446.91, which includes the sum of \$30,000 advanced by the United States for the installation of the three fish traps for the 1959 fishing season.

6. That the Secretary of the Interior, the Honorable Fred A. Seaton, during the latter part of 1958, assured the Association it could install floating fish traps, and by virtue of this and other official releases and notices preparations were made for the 1959 season, including the borrowing of money from the United States for the purchase of materials for the traps. That on March 19, 1959, the Secretary of the Interior issued a regulation in the Federal Register, numbered 115.26, stating that:

"Salmon traps owned and operated by native Indian communities may be operated in 1959 at the following sites:

(c) Angoon Community Association.

(1) Angoon-Basket Bay, located at 57° 26' 16" N. Lat., 134° 51' 34" W. long.

(2) Angoon-Eagle Island, located at 57° 22' 28" N. Lat., 134° 34' 18" W. long.

(3) Angoon-Point Caution, located at 57° 13' 52" N. Lat., 124° 39' 05" long."

7. That the money invested in equipping the three traps, as mentioned in paragraph 5 above, if the community is deprived the use of the traps, cannot be recovered. That the traps are made up and readied for operation, and the materials therein would be rendered valueless if the traps had to be dismantled, as the components, such as wire mesh, webbing, labor, etc., would be unsalvageable. In addition thereto there will be not less than a 30% loss of production of fish which cannot otherwise be recovered. All available seine boats have been utilized in the past, and it is quite [fol. 48] unlikely there would be any substantial increase in their catches. There is a great lack of seine boats in Alaska, and none could be built or manned within the brief time remaining before the season opens. That the loss of use of traps means fewer cases of salmon will be produced, and the cannery, which is practically the sole means of support for the Angoon natives, will be forced to cut employment. That the loss of production normally enjoyed from the trap could conceivably result in a partial or com-

plete closure of the cannery. That there is no provision in law for the extension of the salmon fishing season whereby the Angoon Community Association, if the said fish traps are not allowed to fish with the result the production would be dependent upon the catches from the members' 16 seine boats, could possibly recapture the loss the banning of said traps would create.

8. That on or about June 5, 1959, the State of Alaska notified the Angoon Community Association that it could not install or operate the fish traps above mentioned, and that it would arrest and attempt to obtain the conviction of anyone who attempted to install said traps under an alleged State statute, and that said threatened action by the State of Alaska has interfered with the fishing rights of the Association and prevented the installation of said traps, all of which has done the Association irreparable injury and damage for which there is a lack of legal remedy, as affiant verily believes.

9. That the Indian Reorganization Act of June 18, 1934, as applied to Alaska and to the plaintiff, has looked toward the creation of a solid fishing economy benefiting the Indians and the members of the plaintiff corporation; that it has been applied through use of the cooperative fishing and processing venture in an effort to raise the standard of living above that of a mere subsistence level; that the [fol. 49] choice of creating a solid fishing economy, over that of some other type of economy was determined by the physical location of plaintiff's village, the resources available to it, and the capacities and capabilities of its members; that no other economic base has been established nor has any type of economic base appeared available and suitable to our needs or abilities; that the members of the plaintiff corporation are incapable, through no fault of their own, of finding and placing in operation a substitute base of economy; that it is the understanding of myself and the members of the plaintiff corporation that the decision of the Secretary of the Interior to allow the plaintiff to utilize the trap sites herein involved was based (in addition to legal principles) upon a continuing fulfillment of a plan to create a sound fishing economy for us; that the loss of these trap sites and the right to fish them and the re-

sultant closure of our cannery (or the curtailment of operation to a point where its benefits become insignificant) operation will wipe out all advances we have made toward establishing ourselves within a strong social and economic framework of living and will leave us with no avenue of escape from a lifetime of dependence upon public relief.

10. That the State of Alaska will suffer no damage from the granting of a temporary restraining order.

Samuel G. Johnson

Subscribed and sworn to before me this 22d day of June, 1959.

Robert L. Jernberg, Notary Public for Alaska, My
commission expires: April 29, 1961.

(Seal)

[fol. 50]

MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL
AND ORDER THEREON

Omitted. Printed side folio 191, page 66, supra.

[fol. 52]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA
DIVISION NUMBER ONE AT JUNEAU
Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

MOTION TO DISMISS—June 23, 1959

Comes now the defendant, Governor of Alaska, through his attorney, the Attorney General, and moves this Court to dismiss the cause herein on the ground that the complaint fails to state a claim upon which relief may be granted.

1. The Situs of all places here involved is within Inland waters of Alaska or on the tidelands of Alaska over which the State has, in this instance, exclusive jurisdiction.
2. Plaintiff has no property right in a fish trap location.
3. The State of Alaska has authority to prohibit fish traps for use in commercial fishing.
4. The Constitution of Alaska, prohibiting fish traps without exception, has amended the White Act, 48 U. S. C. A. 221 et seq.
5. Regulation 115.26/ Revised Regulations of 1959, promulgated by the Secretary of the Interior, Fred A. Seaton, is invalid.
 - a. Creates a discrimination not permitted under the White Act.
 - b. Conflicts with the Constitution of Alaska.

[fol. 53] And for such other reasons as may appear from the memorandum to be filed herein and made a part of this motion.

Dated ~~at Juneau~~, Alaska, this 23rd day of June, 1959.

John L. Rader, Attorney General of Alaska, By
James M. Fitzgerald, Special Assistant Attorney
General.

Copy received 6-27-59
R. L. Jernberg

[fol. 54]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

MOTION TO DISMISS—June 23, 1959

Comes now the defendant, Governor of Alaska, through his attorney, the Attorney General, and moves this Court to dismiss the cause herein on the ground that the complaint fails to state a claim upon which relief may be granted.

1. The situs of all places here involved is within Inland waters of Alaska or on tidelands of Alaska over which the State has, in this instance, exclusive jurisdiction.

2. Plaintiff has no property right in a fish trap location.

3. The State of Alaska has authority to prohibit fish traps for use in commercial fishing.

4. The Constitution of Alaska, prohibiting fish traps without exception, has amended the White Act, 48 U. S. C. A. 221 et seq.

5. Regulation 115.26, Revised Regulations of 1959, promulgated by the Secretary of the Interior, Fred A. Seaton, is invalid.

[fol. 55] a. Creates a discrimination not permitted under the White Act.

b. Conflicts with the Constitution of Alaska.

And for such other reasons as may appear from the memorandum to be filed herein and made a part of this motion.

Dated at Juneau, Alaska, this 23rd day of June, 1959.

John L. Rader, Attorney General of Alaska, By
James M. Fitzgerald, Special Assistant Attorney
General.

(Copy received 6-23-59)

R. L. Jernberg

[fol. 56]

AFFIDAVIT OF WALTER KIRKNESS

Omitted. Printed side folio 43, page 41, supra.

[fol. 58]

AFFIDAVIT OF HAAKON B. FRIELE

Omitted. Printed side folio 45, page 43, supra.

[fol. 64]

AFFIDAVIT OF CLARENCE D. PAYNE

Omitted. Printed side folio 51, page 48, supra.

[fol. 123]

AFFIDAVIT OF ALF ERICKSON

Omitted. Printed side folio 173, page 51, supra.

[fol. 124]

AFFIDAVIT OF NEIL GRANT

Omitted. Printed side folio 174, page 51, supra.

[fol. 125]

AFFIDAVIT OF HAROLD MARTINDALE

Omitted. Printed side folio 175, page 52, supra.

[fol. 126]

AFFIDAVIT OF WILLIAM E. SMITH

Omitted. Printed side folio 176, page 52, supra.

[fol. 127]

**AFFIDAVIT OF PETERSBURG FISHING VESSEL
OWNERS' COOPERATIVE**

Omitted. Printed side folio 177, page 53, supra.

[fol. 129]

**REPORTER'S TRANSCRIPT OF EXTRACT OF PROCEEDINGS—
June 29, 1959**

Omitted. Printed side folio 179, page 54, supra.

[fol. 132]

**EXTRACT OF REPORTER'S TRANSCRIPT OF PROCEEDINGS ON
JULY 1, 1959, CONTAINING APPELLANTS' ORAL
NOTICE OF APPEAL**

Omitted. Printed side folio 182, page 57 supra.

[fol. 133]

OPINION—Filed July 1, 1959

Omitted. Printed side folio 183, page 58, supra.

[fol. 141]

SUPPLEMENTAL FINDINGS OF FACT NOS. 1, 2 AND 3

Omitted. Printed side page 67, supra.

[fol. 143]

**MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL
AND ORDER THEREON**

Omitted. Printed side folio 191, page 66, supra.

[fol. 145]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
DIVISION NUMBER ONE AT JUNEAU
No. 8063-A

In the matter of the ORGANIZED VILLAGE OF KAKE,
Plaintiff,

v.

WILLIAM A. EGAN, Defendant.

ORDER FOR DISMISSAL

This Matter having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959: plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through his counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental findings of fact is in lieu of findings of fact and conclusions of law,

It Is Therefore Ordered, Adjudged and Decreed that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

Witness my hand and seal of this honorable Court this 2nd day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 146]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

DIVISION NUMBER ONE AT JUNEAU

No. 8064-A

In the Matter of the ANGOON COMMUNITY ASSOCIATION,
Plaintiff,

v.

WILLIAM A. EGAN, Defendant.

ORDER FOR DISMISSAL

This Matter having come on before the Court for final hearing on plaintiff's complaint for a permanent injunction on the 29th day of June, 1959; plaintiff appearing through its counsel, R. L. Jernberg and C. L. Cloudy, and defendant appearing through its counsel, the Attorney General for the State of Alaska, and the Court having heard oral argument and having rendered its opinion, which opinion with supplemental findings of fact is in lieu of findings of fact and conclusions of law,

It Is Therefore Ordered, Adjudged and Decreed that the complaint of the plaintiff be and it hereby is dismissed with prejudice.

Witness my hand and seal of this honorable Court this 2nd day of July, 1959.

Raymond J. Kelly, District Judge.

[fol. 149]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
DIVISION NUMBER ONE AT JUNEAU
No. 8063-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA

v.

WILLIAM A. EGAN, as Governor of the State of Alaska

No. 8064-A

ANGOON COMMUNITY ASSOCIATION

v.

WILLIAM A. EGAN, as Governor of the State of Alaska

JOURNAL ENTRY OF MONDAY—June 29, 1959
3:15 o'clock P.M.

At this time the hearing of this case was resumed with Mr. Fitzgerald continuing with his arguments in behalf of State of Alaska. At 4:00 p.m. there was another recess for 10 minutes, after which Mr. Fitzgerald continued his arguments. at 5:06, Mr. Cloudy, in Rebuttal raised a few Points referred to by Defendant.

Mr. R. H. Ziegler, Sr. informed the court that the matter of the Metlakatla Hearing would be ready at 1:30 P.M. tomorrow, to which the Court concurred. The same maps and exhibits are to be used, there being no objections from the present counsel in these two cases, as there will probably be an overlapping of conditions and situations.

The decision in these two cases will hold until after the hearing of the Metlakatla case.

Thereupon court adjourned till 9:30 tomorrow.

[fol. 150] AFFIDAVIT OF LT. E. L. MAYFIELD

Omitted. Printed side folio 212, page 70, supra.

[fol. 152]

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
DIVISION NUMBER ONE AT JUNEAU
Civil Action No. 8063-A

ORGANIZED VILLAGE OF KAKE, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

Civil Action No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
Defendant.

MOTION TO CONSOLIDATE—June 23, 1959

Defendant moves this court for an order consolidating the above-titled cases for purposes of briefing, argument and hearing, for the reason that they involve similar questions of law and fact. That this consolidation will considerably expedite the hearings, will suit the convenience of the parties, and cause injury to no one.

Dated at Juneau, Alaska this 23 day of June, 1959.

[fol. 153] John L. Rader, Attorney General of
Alaska, James M. Fitzgerald, Special Assistant
Attorney General.

(Copy received 6-23-59)
R. L. Jernberg

ORDER—June 23, 1959

On motion of defendant, it is hereby ordered that the above-entitled cases be and are hereby consolidated for purposes of briefing, argument and hearing.

Dated at Juneau, Alaska, this 23rd day of June, 1959.

Raymond J. Kelly, District Judge.

[fol. 154] **AFFIDAVIT OF WALTER KIRKNESS**

Omitted. Printed side folio 43, page 41, supra.

[fol. 163]

IN THE DISTRICT COURT FOR THE DISTRICT OF ALASKA

DIVISION NUMBER ONE, AT JUNEAU

No. 8063-A

THE ORGANIZED VILLAGE OF KAKE, ALASKA; Plaintiff,

v.

**WILLIAM A. EGAN, as Governor of the State of Alaska,
Defendant.**

No. 8064-A

ANGOON COMMUNITY ASSOCIATION, Plaintiff,

v.

**WILLIAM A. EGAN, as Governor of the State of Alaska,
Defendant.**

REPORTER'S TRANSCRIPT OF PROCEEDINGS—June 23, 1959

Be It Remembered, that on the 23rd day of June, 1959, court having convened at 9:30 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for hearing; the

Honorable Raymond J. Kelly, United States District Judge, presiding; the plaintiffs appearing by R. L. Jernberg and C. L. Cloudy, their attorneys; the defendant appearing by John Rader, Attorney General of Alaska, Douglas Gregg, Assistant Attorney General, and James Fitzgerald, Special Assistant Attorney General; and at the conclusion of the hearing the Court ruled as follows:

[fol. 164] The Court: Well, this of course is a very important matter to both sides, and in a matter of such broad public interest as this which we have here, especially where we have an arm of the Federal Government opposed to the sovereign State of Alaska over the interests of a small minority of the citizens of such State, this Court must exercise great caution in interfering with the situation as it exists today at this very moment.

Now, plaintiffs state they cannot properly proceed today, and I can understand their reasons, which appear reasonable. A question of this importance must be carefully prepared and fully presented so that a complete record may be made.

As this Court was reluctant to issue any sort of a temporary restraining order herein without notice so is the Court reluctant to issue any such order which would in effect permit the installation and operation of the traps until their legal status is determined. Since the Court is willing to hear this today, and since the defendant is ready to proceed in opposing the issuance of a temporary injunction at this time, but the plaintiff cannot present their case in this regard until next Monday, this Court feels that no temporary restraining order should issue and that the hearing on the application for temporary injunction should be set for 9:30 a.m., Monday, June 29th.

I realize this action may result in the loss of a few days operation of the traps if the Court finds the injunction should issue. On the other hand, the loss to plaintiffs would be considerable also should the Court find that no injunction should issue. The plaintiff's rights are not so clear in the face of matters within the knowledge of the Court of which he is bound to take notice as to come within a situation where a clear, unclouded, unquestionable, and complete property right is about to be interfered with. The only way

2

this matter can be properly determined is by a complete and full hearing, and this we will have on June 29th at 9:30 a.m.

(End of Extract of Proceedings)

[fol. 165] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 229]

EXHIBIT

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25 D.C.

Air Mail

Mar 10 1959

Dear Mr. Hawkins:

The Department's press release of November 14, 1958 announced the notice of public hearing on the proposal to adopt amendments to existing regulations for the protection of commercial fisheries in Alaska, published in the Federal Register of November 14, 1958. As stated in the release, publication followed the decision on November 8 to propose elimination of all fish traps except those owned by Indian tribes or villages.

The proposal to eliminate fish traps in the pending regulations was motivated by the desire of the Department to adjust its actions as quickly as possible to the desires of the Alaskans in regard to the control of their natural resources. The people of Alaska twice voted in referendum to abolish traps.

As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339) the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held

by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians, Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages.


The Angoon Community Association, the Organized Village of Kake, and the Metlakatla Indian Community may proceed to make plans for operation of their salmon canneries in 1959 on the basis that they will be permitted to continue to operate the number of fish traps consistent with proper conservation practices recommended by this Department.

Sincerely yours,

/s/ Elmer F. Bennett
Secretary of the Interior

Mr. James E. Hawkins
Area Director, Juneau, Alaska

Copy to Credit and to Solicitor



[fol. 230]

EXHIBIT

PERMIT No.
WD-386

Sheet No. 9

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT

Anchorage, Alaska

Refer to File No. 825-91-6
(P.E. Harris Company, Inc.) 251

24 April 1950

U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska

Gentlemen:

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD 386 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on Point Pybus, east shore of Admiralty Island, and in Frederick Sound, Alaska. (Latitude 57°18'40"N. Longitude 133°57'21"W) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, ALASKA.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ L. E. Seeman
L. E. SEEMAN
Colonel, CE
District Engineer

[fol. 231]

EXHIBIT**PERMIT No.
WD-390****Sheet No. 9****CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT****ANCHORAGE, ALASKA****Reply to File No.
825-91-6 (P. E. Harris
Company, Inc.) 254****24 April 1950****U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska****Gentlemen:**

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD-390 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on Cornwallis Point, north shore Kuiu Island, and in Saginaw Bay, Alaska (Latitude 56°55'52" N., Longitude 134°16'08" W.) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ **L. E. Seeman
L. E. SEEMAN
Colonel, CE
District Engineer**

[fol. 232]

EXHIBIT

PERMIT No.
WD-395

Sheet No. 9

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT

ANCHORAGE, ALASKA

Refer to file No.
825-91-6 (P. E. Harris
Company, Inc.) 259

24 April 1950

U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska

Gentlemen:

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD-395 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on Point Macartney, Kupreanof Island, and in Keku Strait, Alaska. (Latitude 57°01'23" N. Longitude 134°02'50" W) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ L. E. Seeman
L. E. SEEMAN
Colonel, GE
District Engineer

[fol. 233]

EXHIBIT

PERMIT No.
WD-389

Sheet No. 8

CORPS OF ENGINEERS, U. S. ARMY
OFFICE OF THE DISTRICT ENGINEER
ALASKA DISTRICT

ANCHORAGE, ALASKA

Refer to File No.
825-91-6 (P. E. Harris
Company, Inc.) 253

24 April 1950

U. S. Department of the Interior
Bureau of Indian Affairs
Alaska Native Service
Juneau, Alaska

Gentlemen:

In accordance with paragraph (b) (5) of the regulations governing the placing and maintenance of fishing structures in the coastal waters of Alaska and navigable waters tributary thereto, as approved by the Secretary of War 24 February 1947, and in accordance with your written request dated 21 April 1950, the authorization granted by the Secretary of War in permit No. WD-389 to P. E. Harris and Company, in letter from the District Engineer, Seattle, Washington, dated 24 April 1947, to construct and maintain a fish trap on the Alaska Mainland, approximately 1 nautical mile southeast of Cape Fanshaw Light and in Frederick Sound, Alaska. (Latitude 57°10'52" W., Longitude 133°32'44" W) is hereby transferred to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska.

The conditions to which the authorization is made subject remain in full force and effect.

Very truly yours,

/s/ L. E. Seeman
L. E. SEEMAN
Colonel, GE
District Engineer

[fol. 234]

EXHIBIT
D E E D

KNOW ALL MEN BY THESE PRESENTS:

That AUGUST BUSCHMANN, H. A. FLEAGER and ARTHUR P. WOLF, co-partners doing business under the firm name and style "HOOD BAY SALMON COMPANY", as grantors, do by these presents for a valuable consideration grant, bargain, sell and convey unto the UNITED STATES OF AMERICA, Grantee, in trust for the Angoon Community Association, that certain trade and manufacturing site situated on the north shore of Hood Bay near the entrance of North Arm on Admiralty Island, being Non-Mineral United States Survey No. 1480, more particularly bounded and described as follows:

Beginning at corner No. 1, meander corner, impracticable to establish; from which U. S. Location Monument No. 1480, bears north sixty-three degrees one minute west three and twenty-nine hundredths chains distant; thence, north forty-five minutes west one and three tenths chains to witness corner to said corner No. 1, meander corner, an iron pipe four inches in diameter, thirty-six inches long, marked MC S-1480 WC COR 1 with a nail in top at correct point; five and twenty-seven hundredths chains to corner No. 2, an iron pipe four inches in diameter, thirty-six inches long, marked S1480 COR 2 with nail in top at correct point, thence, south eighty-nine degrees thirty minutes west eleven and thirty-nine hundredths chains to corner No. 3, an iron pipe three inches in diameter, thirty-six inches long, marked S1480 COR 9 with nail in top at correct point: (stamped) thence, south fifty-four degrees twenty-eight minutes west eleven and sixty-nine hundredths chains to corner No. 4, an iron pipe three inches in diameter, thirty-six inches long, marked S1480 COR 4 with nail in top at correct point; thence, south

(stamped) forty-five degrees thirty minutes east four and thirty-four hundredths chains to witness corner to corner No. 5 MC, an iron pipe three inches in diameter, thirty-six inches long, marked S1480 COR 5 MC with nail in top at correct point; five and forty-one hundredths chains to corner No. 5 MC, impracticable to establish; thence, meandering the north shore of Hood Bay at mean high tide, north fifty-five degrees fifty-two minutes east nine tenths of a chain, north fifty-seven degrees twenty-seven minutes east two and twenty-four hundredths chains, north sixty-two degrees forty-four minutes east one and seventy-three hundredths chains, north fifty-five degrees fifty-four minutes east one and forty-eight hundredths chains, north forty-five degrees eighteen minutes east one and twenty-six hundredths chains, north thirty-eight degrees six minutes east two and seventy-four hundredths chains, north sixty-four degrees twenty-two minutes east one and six tenths chains, north eighty-eight degrees forty-eight minutes east two and six hundredths chains, south seventy-one degrees fifty-five minutes east one and eighty-four hundredths chains, south seventy-four degrees forty-three minutes east four and two hundredths chains to corner No. 1 MC, the place of beginning, containing ten acres and twenty-four hundredths of an acre, according to the official plat of the Survey of the said Land, on file in the General Land Office.

SUBJECT To: exceptions and reservations contained in United States Patent No. 1027418, Anchorage Serial No. 05521

together with all improvements thereon and the appurtenances thereunto belonging.

[fol. 235] **TO HAVE AND TO HOLD** the same unto the said United States of America and its assigns in trust for the Angoon Community Association forever. Grantors do jointly and severally, for themselves, their heirs, executors

and administrators covenant to and with the said United States and its assigns, forever, that they are lawfully and jointly seized in fee simple of the above described and granted property and premises and have a good and valid right to sell and convey the same; that said property and premises are at the time of the execution hereof, free from all encumbrances whatsoever except as provided in that certain lease to the Whiz Fish Products Company dated January 29, 1947, and except as herein stated; that they, their heirs, executors and administrators will warrant and defend the same to the said grantee and its assigns forever against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, grantors have set their hands and seals this 24th day of March, 1948.

/s/ August Buschmann (seal)

/s/ H. A. Fleager (seal)

/s/ A. P. Wolf (seal)

Co-partners doing business under the name
and style "HOOD BAY SALMON COMPANY"

(Notary Seal Stamp)

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

On this day personally appeared before me AUGUST BUSCHMANN, H. A. FLEAGER and ARTHUR P. WOLF, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 24th day of March, 1948.

/s/ David O. Hamlin
Notary Public in and for the State of
Washington, residing at Seattle.

TERRITORY OF ALASKA)
 JUNEAU, ALASKA) ss

The within instrument was filed for record 10:30 A.M. o'clock, April 8, 1948, and duly recorded in book 40 of Deeds on pages 378, 379 of the record of said District.

Felix Gray (ls)
 District Recorder

Filing fee \$3.50

Paid Collect 3.40 Recorded by ls, 11-8

[fol. 236]

EXHIBIT

DEED.

The Grantor, P. F. HARRIS & Co., a Washington corporation, for and in consideration of the sum of ONE DOLLAR (\$1.00), lawful money of the United States in hand paid, and other valuable considerations, conveys and warrants to the UNITED STATES OF AMERICA in trust for the ORGANIZED VILLAGE OF KAKE, Alaska, the following described real estate located in Southeastern Alaska, to-wit:

Beginning at corner No. 1, on beach and not established, from which U. S. Location Monument F. M. R. bears north fifty-four degrees, eighteen minutes, fifty seconds west eighty-five and sixty-eight hundredths chains distant; thence north sixty-seven degrees, forty-three minutes east one and forty-six-hundredths chains to witness corner to said corner No. 1, a granite boulder, 24 x 14 x 10 inches, marked with cross (x) on top at corner point and S 963, Cor. 1 W.C., M.C., M.C.; seven and seventeen-hundredths chains to corner No. 2, a granite boulder, 22 x 12 x 5 inches, marked with cross (x) on top at corner point and S 963 Cor. 2; thence south twenty-two degrees, seventeen minutes east nineteen and three-hundredths chains to corner No. 3, a granite stone, 20 x 12 x 5 inches, marked with cross (x)

on top at corner point and S 963 Cor. 3; thence south sixty-seven degrees, forty-three minutes west six and fifty-six-hundredths chains to witness corner to corner No. 4, a granite boulder 20 x 12 x 10 inches, marked with cross (x) on top at corner point and S 963 Cor. 4 W.C., M.C.; eight and seventy-two-hundredths chains to corner No. 4, on beach and not established; thence meandering arm of Frederick Sound, north thirteen degrees, twenty-five minutes west five chains, north twenty-six degrees, fifty-one minutes west two and nine-tenths chains, north six degrees, forty-seven minutes east one chain, north forty-seven degrees, two minutes west one and six-tenths chains, north thirty degrees, forty-four minutes west four and four-tenths chains, north nine degrees, two minutes west three and nine-tenths chains, north twenty-nine degrees, fifty-eight minutes east one and two-tenths chains to corner No. 1, the place of beginning, containing fifteen and ninety-hundredths acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor-General.

This instrument is made pursuant to an agreement for the sale of properties by the Grantor to the Grantee dated December 15, 1959; this instrument being executed for recording in the Petersburg Recording District.

IN WITNESS WHEREOF, said Grantor has caused these presents to be executed by its proper officers and its corporate seal to be hereunto affixed this 15th day of February, 1950.

P. E. HARRIS & Co.

By E. M. Brennan
Vice-President

[fol. 237]

ATTEST:

(Darline Fravel)
Assistant Secretary (SEAL)

STATE OF WASHINGTON)

\$9

COUNTY OF KING

On this 15th day of February, 1950, before me personally appeared E. M. BRENNAN and DARLINE FRAVEL, to me known to be the Vice-President and Assistant Secretary, respectively, of P. E. HARRIS & Co., the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ John D. Henry
Notary Public in and for the State of
Washington, residing at Seattle.

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JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

—
No. 2
—

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND
RESERVE, a Federally Chartered Corporation,**
Appellant,

v.

**WILLIAM A. EGAN, Governor of the State of Alaska,
and THE STATE OF ALASKA, Appellees.**

—
**On Appeal from the Supreme Court of the
State of Alaska**
—

STATEMENT AS TO JURISDICTION
—

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND
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and THE STATE OF ALASKA, Appellees.**

**On Appeal from the Supreme Court of the
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STATEMENT AS TO JURISDICTION

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Alaska, entered on June 2, 1961, affirming a judgment of the transitional District Court for the State of Alaska.¹ It submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

¹ The appeal was pursued in the Supreme Court of Alaska in accordance with the following order of the Supreme Court of the United States in Nos. 326 and 327, O.T. 1959, dated June 20, 1960:

"THESE CAUSES came on to be heard on the transcript of the record from the District Court for the State of Alaska, and were argued by counsel.

"ON CONSIDERATION WHEREOF, It is ordered that these cases be held in the docket of this Court to afford the Supreme Court of Alaska the opportunity to rule on questions open to it for decision in these cases and that these causes be continued with directions to appellants to pursue their appeals to the Supreme Court of Alaska for disposition not inconsistent with the opinion of this Court and the stay granted by Mr. Justice Brennan on July 11, 1959, is continued until the final disposition of these cases."

OPINION BELOW

The opinion of the Supreme Court of Alaska is as yet unreported. The opinion of the transitional District Court, filed on July 1, 1959, is reported at 174 F. Supp. 500. The opinion of the Supreme Court of Alaska is set forth in an Appendix which is filed herewith as a separate document.

A companion case, involving a direct appeal from the transitional District Court and raising the same substantive questions as this appeal, was previously before this Court. The opinion of Mr. Justice Brennan who, as Circuit Justice, granted appellant a preliminary injunction on July 11, 1959 is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959). The opinion of the full Court, rendered June 20, 1960, directing the appellant to pursue an appeal in the Supreme Court of Alaska, is reported at 362 U.S. 555 (1960).

JURISDICTION

1. This suit was brought in the District Court of Alaska, after Alaska became a State but before it had established a permanent court system, to enjoin the enforcement of certain Alaska criminal statutes (17 SLA 1959 and 95 SLA 1959) which, as now interpreted, make it a crime for appellant and its members to erect, moor, maintain and operate fish traps within the Metlakatla Indian Reservation, even though they have express permission from the Secretary of the Interior to do so. An injunction was sought on the ground that the State statutes, as applied to appellant, are in conflict with various statutes, Executive Orders and regulations of the United States, and therefore, void under the Supremacy Clause of the United States Constitution.

From an adverse decision by the District Court, appellant took a direct appeal to this Court, pursuant to 28 U.S.C. § 1257(2). A question as to this Court's jurisdiction over the appeal was raised and was considered by this Court. Its decision was that the State District Court was the "highest court" of the State at the time the decision was rendered, and that jurisdiction, therefore, lay. Nonetheless, this Court abstained from deciding the merits of the controversy, which it characterized as "not free from doubt, to put it as its lowest." It did so in order to afford the newly constituted Supreme Court of Alaska, to which a precautionary appeal had been taken after it was constituted, to rule initially upon the questions presented. Directing appellant to seek relief in the Supreme Court of Alaska, this Court continued in effect the preliminary stay granted by Mr. Justice Brannan "until final disposition of the cases." The Court noted that "after the Alaska Supreme Court's decision there may be further proceedings on this appeal, and if it assumes jurisdiction, a further appeal may be taken from its judgment." 363 U.S. at 562.

2. The Alaska Supreme Court did assume jurisdiction of this case and affirmed the judgment of the District Court. Its judgment was entered on June 2, 1961, and a notice of appeal was filed in that Court on July 27, 1961.

3. The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1257 (1) and (2).

4. The following decision sustains the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal:

Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Alaska anti-fish trap law, 17 SLA 1959 and 95 SLA 1959, as applied to appellant's fishing in an exclusive Federal Reserve, is repugnant to the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358, to Presidential Proclamation No. 1332, 39 Stat. 1777, as ratified by the Act of May 7, 1934, 48 Stat. 667, to Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1959) and to regulations of the Secretary of the Interior issued thereunder, 25 C.F.R. Part 88, all of which authorize appellant to fish in the Metlakatla Reserve subject only to Federal control, and whether the Alaska Statute, therefore, violates the Supremacy Clause of the United States Constitution.

2. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332 are invalid because they were repealed by implication by the Alaska Statehood Act.

3. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, if they were not repealed, are unconstitutional in that they are beyond the powers of the Federal Government to enact and proclaim, respectively, and whether this Court erred when it upheld the Act of 1891 and the Presidential Proclamation in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

4. Whether Section 4 of the Alaska Statehood Act, which provides that Indian trust property, including fishing rights, in Alaska, "shall be and remain under the absolute jurisdiction and control of the United

States," is unconstitutional in that it violates the Equal Footing Doctrine.

5. Whether Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act, 73 Stat. 141, if construed as reaffirming the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, are invalid because they have not received the express consent of the State of Alaska.

STATUTES INVOLVED

The provisions of the statutes, executive orders, and regulations involved are lengthy. The principal statutes, treaties, proclamations and regulations involved have previously been printed at pages 2 through 6 of the brief of Metlakatla Indian Community No. 326 OT 1959, (No. 2 OT 1961).

The following two statutes, not previously printed, are also involved:

- (a) Sec. 2(a) Alaska Omnibus Act, 73 Stat. 141 (1959)

Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives."

- (b) Sec. 3(b) of the Act of May 7, 1934, 48 Stat. 667

The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or col-

lective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. Any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively.

STATEMENT OF THE CASE

The Metlakatla Indian Community is an Indian Tribe, organized under the provisions of the Indian Reorganization Act, 48 Stat. 987, as amended, 25 U.S.C. § 476. Its members are the Metlakatla Indians, who occupy the Annette Islands Indian Reservation. The Reservation was created by § 15 of the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358. This Court has held that the Reservation includes "the surrounding water", *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). This surrounding area was defined by metes and bounds by Presidential Proclamation No. 1332, 39 Stat. 1777 (1916), which definition was ratified by Congress, 48 Stat. 607 (1934), and by this Court, *Hynes v. Grimes Packing Co.*, 337 U.S. 80, 112-114 (1949).

Salmon fishing with traps is the foundation on which the Community cannery, which employs hundreds of Metlakatlans, rests. As Justice Brennan pointed out in his opinion of July 11, 1959, granting a temporary stay:

"The Indian members of this reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only

means of support for substantially all of the inhabitants of the reservation. The Metlakatla Indian Community is obligated to make specific payments to the United States each year in repayment for facilities and equipment bought for its use by the Government. It relies on earnings from its fishing and canning operations to make these payments." 4 L. Ed. 2d at 35.

The present controversy arose out of the attempt by Alaska officials to enforce, within the confines of the Metlakatla Reservation, the Alaska anti-fish trap act, even though the Secretary of the Interior had expressly permitted the Community to maintain traps at four designated sites.

In February 1959 the State of Alaska enacted a general anti-fish trap law. 17 S.L.A. 1959. Two months later the law was modified to make explicit that it was not designed to conflict with Section 4 of the Alaska Statehood Act. 95 S.L.A. 1959. Nevertheless, State officials construed the law as applying to fishing by appellant within its exclusive reservation, and threatened to imprison members of the Community responsible for the maintenance of the traps (R. 13, 40). To enjoin the threatened invasion of its rights on the Reservation, the Metlakatla Indian Community initiated this suit.

The complaint alleged that application of the Alaska fish trap statutes as applied to appellant are "unconstitutional and invalid in that they are in derogation of and in direct conflict with, . . . applicable federal laws" (R. 16) and that "the action threatened by the defendants violates and is repugnant to, the laws of the United States and the Constitution of the State of Alaska," (R. 18). The appellee moved to

dismiss "on the ground that the complaint fails to state a claim upon which relief may be granted."

The District Court rejected appellant's contentions, holding, by inference, that Indian fishing rights are subject to State regulation; that any purported congressional limitation upon State control of Indian fishing would violate the "equal footing" doctrine; and that Indian fishing rights disappeared upon Statehood.

An appeal was taken to this Court, and, as previously noted, it abstained from deciding the case on its merits in order to afford the newly created Supreme Court of Alaska an opportunity to pass upon the issues. That Court, when called upon to rule, held that the Metlakatla water reservation disappeared when Alaska became a state. The opinion is not wholly clear. But it is apparent that the Supreme Court of Alaska (1) found Section 4 of the Statehood Act not to be a valid part of the compact of Alaska's admission to the Union, (2) found the Alaska Omnibus Act to be unconstitutional, (3) and found that the repeated Congressional and executive actions establishing, nurturing and preserving the reservation to have been mysteriously repealed or negated by Alaska's admission to the Union.

THE QUESTIONS ARE SUBSTANTIAL

The issues in this case go to the heart of our Federal system. Since 1891, Congress has repeatedly and deliberately acted to preserve the fishing rights of the Metlakatla Indians. Native rights were carefully considered by Congress during the struggle over Alaska Statehood. See e.g. H.R. Rep. No. 1731, 80th Cong., 2d Sess. 31 (1948); S. Rep. No. 1929, 81st Cong., 2d Sess. 1-2 (1950); H.R. Rep. No. 624, 85th Cong., 1st

Sess. 19 (1957). In view of the fact that Alaska natives were concerned that statehood might adversely affect their hunting and fishing rights, they requested and were assured that the *status quo* as to these rights would be preserved. This assurance was, in fact, written into the Act. Section 4 Alaska Statehood Act, 72 Stat. 339 (1958). After Statehood was achieved, the Secretary of the Interior issued regulations to define explicitly some of the rights protected by the Statehood Act. *Inter alia*, the regulations authorized the Metlakatla Indian Community to operate four fish traps. 25 C.F.R. § 88.2(e).

In spite of the action by both the legislative and executive branches of the Federal Government, the State of Alaska has attempted to regulate fishing by the Metlakatla Indian Community within its exclusive Fishery Reserve and has attempted to prohibit the operation of fish traps within the Reserve. In these attempts it has been sustained by the Alaska Supreme Court which went so far in invalidating Federal statutes that its decision, if followed to its logical conclusion, would mean that Metlakatla's land reservation evaporated with its water reservation and that the Metlakatlans are now squatters on the land on which they were born and have lived all their lives.

The Metlakatla Reservation was established by the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358 (1959), which set apart "the body of lands known as Annette Islands . . . to be held and used by [the Metlakatla Indians] in common under such rules and regulation, and subject to such restrictions as may be prescribed from time to time *by the Secretary of the Interior.*" (Italics supplied.) President Wilson, in 1916, defined the outer boundaries of the reservation, within

which appellant had the exclusive right to fish, as three thousand feet from the shore lines at mean low tide. This area was "to be used by [the Metlakatians] under the general fisheries laws and regulations of the United States . . ." Pres. Proc. No. 1332, April 28, 1916, 39 Stat. 1777. (Italics supplied.) If this Presidential Proclamation required Congressional ratification, such ratification occurred with the Act of May 7, 1934, 48 Stat. 667. The validity of the reservation and its attendant fishing rights was affirmed by this Court in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), and reaffirmed in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949).

The foregoing statutes and proclamation would have survived Alaska's elevation to statehood even if native fishing rights had not been mentioned in the Alaska Statehood Act. They could not be held to have been repealed by implication. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Squire v. Capoean*, 351 U.S. 1, 7 (1956). However, the Statehood Act not only failed to repeal native fishing rights, it expressly reaffirmed them. Sec. 4, Alaska Statehood Act, 72 Stat. 339 (1958). Further reaffirmation is contained in the Alaska Omnibus Act, 73 Stat. 141 (1959).

All of the foregoing statutes, executive actions and even judicial decisions were stricken down by the Alaska Supreme Court. The ax used by the Court was wielded rather freely, declaring some Federal laws repealed by implication, questioning the constitutionality of others, including some which this Court has heretofore upheld. But it was a blunt ax, for it is difficult to determine from those pages of the opinion devoted to Metlakatla's appeal precisely what the

Court's holdings were. It would appear, though, that they can fairly be described as follows:

(1) The Act of 1891 and the 1916 Proclamation, in the State Court's view, were repealed by implication upon Alaska's achieving statehood. Just how it was done is not clear from the opinion. They simply seem to have faded away, or, as the Court put it, "did not survive Statehood". Appendix, p. 62a. This, the Court seems to have thought, was so because "[n]one of the facts which seemed to justify the creation of the exclusive right of fishery are now operative." *Id.*, p. 61a.

While the Court speaks only of the failure of the water reservation to survive, it is difficult to perceive how, in the absence of an express amendment, a part of a statute can have died and another part remained in effect. It would follow logically from the Court's opinion that the entire Act of 1891 must be discarded. The Supreme Court of Alaska has thus injected a new issue into this case which, at its lowest, casts serious doubts on Metlakatla's rights to its land as well as its exclusive fishery.

(2) If the Act of 1891 and the Presidential Proclamation had not evaporated with statehood, the Alaska Court seems to say, a serious question as to their constitutionality would arise. To quote the Court's words:

"Whether Congress had the power to so subsidize an alien immigrant group, even though they were Indians, seems doubtful. The power of the President to create an exclusive fishery reservation for such a group seems even more doubtful." Appendix, p. 62a.

While the powers of the Congress and the President seem doubtful to the Alaska Supreme Court, they have

seemed clear to this Court, which has explicitly upheld the Fishery Reserve. *Alaska Pacific Fisheries v. United States, supra*; *Hynes v. Grimes Packing Co., supra*. The Alaska Court's pronouncement flies in the face of the holding of a unanimous Supreme Court of the United States, speaking through Mr. Justice Van Devanter, for many decades the country's foremost authority on Federal Indian law:

"That Congress had power to make the reservation inclusive of the adjacent waters and submerged land, as well as the upland, needs little more than statement." *Alaska Pacific Fisheries v. United States, supra*, at 87.

Thus the Alaska Supreme Court has, in its decision, challenged not only the authority of the legislative and executive branches of the government of the United States, but of the judicial branch as well. A most serious question as to the Court's understanding of our Federal system is raised.

(3) With regard to the Alaska Statehood Act and more particularly Section 4 thereof, which preserves native fishing and hunting rights, the Alaska Supreme Court holds, in effect, that said section is a nullity because of its general, all-encompassing wording and "because of the affirmative duty imposed by the Alaska constitution [on Congress!!!] to define any such reservation in the act of admission." Appendix, p. 61a. The Court thus holds that a State can impose on Congress a requirement that legislation take a particular form prescribed by the State or be null and void, even though Congress may be acting in a field in which its power is "plenary", *Lone Wolf v. Hitchcock*, 187 U.S. 553, at 565 (1903), and "paramount and of a most sweeping character." *People ex rel. Ray v. Martin*,

294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), aff'd, 326 U.S. 496 (1946). Once again it would seem that the Court has most seriously challenged the fundamental precepts of our Federal System.

(4) Even if Section 4 is not void for the foregoing reason, the Alaska Supreme Court found it to be invalid because it "withhold[s] sovereignty over its inland waters from a state in the absence of compelling reasons and without definitely describing in the act of admission the extent of the sovereignty intended to be withheld" and is thus "a violation of the equal footing doctrine." Appendix, p. 53a.

The Court thus betrays a fundamental misunderstanding of the constitutional doctrine of equality among the states. This Court has repeatedly held that the equal footing doctrine is not violated when a congressionally-imposed limitation upon a new state is attributable to some power of Congress other than its power to admit new states. (See e.g. *Coyote v. Smith*, 721 U.S. 559 (1911).)

(5) The Alaska Omnibus Act, 73 Stat. 141 (1959) is dismissed by the Alaska Court as another nullity because it lacked the assent of the State. As the Court views it, "the amendment forms no part of the compact between Alaska and the United States." Appendix, p. 20a. Once again the Court has seriously challenged the power of Congress to legislate in a field in which it has plenary jurisdiction.

(6) With regard to the basic, underlying authority of the United States to deal with the Indians of Alaska, the Court says:

"The doctrine of *United States v. Kagama* has never been applicable to the Alaska Indian under

United States rule. No Indian tribe, independent nation or power has been recognized in Alaska." Appendix, p. 39a.

This is said in the face of a stream of Federal assistance to the Indian population of Alaska, reaching back over decades, a stream of assistance of which Senator Gruening once said:

"The extension of the economic and social benefits of the Indian reorganization act to Alaska has paved the way for the security of approximately one-half of the present population of the Territory, whose stabilized future is not only an essential act of humanitarianism but also an important item of wholesome advance." Annual Report of the Secretary of the Interior, 1936, at 30.

It is said in the face of special legislation for the Indians of Alaska, Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 475, the constitutional foundation for which lies in the "Indian commerce clause", United States Constitution, Art. I, Sec. 8, Cl. 3, which is the principal foundation for all Federal Indian legislation, Cohen, *Handbook of Federal Indian Law* (1945). It is also said in the face of explicit recognition of the Metlakatla Indian Community by the Secretary of the Interior, as evidenced by Secretarial approval, on August 23, 1944, of the Community Constitution and Charter under the Indian Reorganization Act. 48 Stat. 987-88, as amended, 25 U.S.C. §§ 476, 477.

The State Court's holding thus clashes sharply with the words of this Court in *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419-420:

"[I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is

to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of congress. . . .

"Neither the Constitution of the state nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of the state the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof."

CONCLUSION

When this case was before this Court at the 1959 October Term, the Court appears to have reached the conclusion that the issues which constitute the basis of this controversy are so substantial as to require plenary consideration for their resolution. This was indicated first by the temporary stay granted by Mr. Justice Brennan, then by the Court's setting the case down for oral argument, and finally by the Court's opinion and its action in continuing the stay in effect. As the opinion of the Court stated:

"... After the Alaska Supreme Court's decision, there may be further proceedings on this appeal; and if it assumes jurisdiction, *a further appeal may be taken from its judgment.*" 363 U.S. at 562 (Italics supplied.)

The decision of the Alaska Supreme Court has now greatly added to the number of substantial Federal

questions requiring resolution. Neither appellees nor the Court below followed the suggestion of this Court by developing a factual record which might sustain Alaska's invasion of an area of Federal responsibility. Instead the Court has returned this case with sweeping conclusions of law which seriously challenge the powers of the Federal Government. It would seem that the many years of struggle for Statehood and of dispute with the Federal bureaucracy have left their mark, for rarely has the highest court of a State gone so far in invading areas of Federal authority, in casting aside laws of Congress, a Presidential Proclamation, regulations of a cabinet officer, and even decisions of this Court, as has the Alaska Supreme Court in this case. The issues now go beyond the controversy between Metlakatla and the State and involve, in its broadest sense, the limitations imposed on the powers of a State by our Federal system. 2

Respectfully submitted,

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APPENDIX TO STATEMENT AS TO JURISDICTION
(Nos. 2, 3, and —, O.T. 1961)

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND
RESERVE AND ORGANIZED VILLAGE OF KAKE, ET AL.,
Appellants,

v.

EGAN, GOVERNOR OF ALASKA, ET AL.,

On Appeal from the Supreme Court of the State of Alaska

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Supreme Court of the United States

OCTOBER TERM, 1961

No.

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND
RESERVE, a Federally Chartered Corporation; OR-
GANIZED VILLAGE OF KAKE; and ANGOON COMMU-
NITY ASSOCIATION, *Appellants,***

v.

**WILLIAM A. EGAN, Governor of the State of Alaska,
and THE STATE OF ALASKA, *Appellees.***

On Appeal from the Supreme Court of the State of Alaska

**APPENDIX TO STATEMENT AS TO JURISDICTION
(Nos. 2, 3, and —, O.T. 1961)**

STATUTES. ETC.. INVOLVED

Statutes, treaties, proclamations and regulations in-
volved have previously been printed at pages 2 through
6 of the brief of Metlakatla Indian Community No.
326 OT 1959, (No. 2 OT, 1961) and in Appendix to
Brief of Kake and Angoon, No. 327 OT 1959, (No. 3
OT 1961).

APPENDIX

IN THE SUPREME COURT OF THE STATE OF ALASKA

File Nos. 21, 22 and 23

Opinion

[No. 42—June 2, 1961]

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE,
a Federally Chartered Corporation; ORGANIZED VILLAGE
OF KAKE; and ANGOON COMMUNITY ASSOCIATION,**
Appellants,

v.

**WILLIAM A. EGAN, Governor of the State of Alaska, and
THE STATE OF ALASKA, Appellees.**

On Appeal from the District Court for the District
(Territory) of Alaska,

First Judicial Division,
Raymond J. Kelly, Judge

Appearances: Richard Schifter, Washington, D. C., Theodore H. Little, Clarkston, Washington, N. C. Banfield, Juneau, Alaska, Attorneys for Appellant, Metlakatla Indian Community; John W. Cragun, Washington, D. C., N. C. Banfield, Juneau, Alaska, Attorneys for Appellants, Organized Village of Kake and Angoon Community Association; Ralph E. Moody, Attorney General of Alaska, and Douglas L. Gregg, Special Counsel to the Governor of Alaska, for Appellee; Perry W. Morton, Asst. Attorney General of the United States and Roger P. Marquis, Department of Justice, for the United States, as amicus curiae.

Before: Nesbitt, Chief Justice, and Dimond and Arend, Justices.

NESBITT, Chief Justice.

These controversies arose out of the determination of the State of Alaska to prohibit the use of all fish traps for

the taking of salmon for commercial purposes in all the coastal waters of the state. Appellants contended that their fish traps were exceptions to the prohibitions contained in the constitution and laws of Alaska because their operation had been authorized by the Secretary of the Interior of the United States, who, they claimed, had the exclusive right to regulate fishing by Indians in Alaska. The United States District Court for the District (Territory) of Alaska in Juneau, on July 2, 1959, acting as an interim or transitional state court, dismissed appellant's suits to enjoin the state from enforcing acts making it a crime to erect, moor, maintain or operate a fish trap. That court denied appellants' motions for preliminary injunctions pending appeal to the Supreme Court of the United States. The Supreme Court of Alaska had not yet been organized. Mr. Justice Brennan, on July 11, 1959, granted a stay pending appeal to the United States Supreme Court.¹ On June 20, 1960, the United States Supreme Court in an opinion reserved decision on the merits of the appeals and directed appellants to pursue their dormant pending appeals in the then existing Supreme Court of Alaska in order to give that Court an opportunity to rule on questions open to it for decision.² This court has jurisdiction to hear appeals from final judgments concerning state matters rendered in the United States District Court for the District (Territory) of Alaska after January 3, 1959³ and accepts jurisdiction of these appeals.

The historical basis for the attitude of the state toward fish traps as well as the nature of the fish trap itself will

¹ *Organized Village of Kake v. Egan*, 4 L. ed. 2d 34, 80 S. Ct. 33 (1959).

² *Metlakatla Indian Community v. Egan*, 363 U.S. 555, 4 L. ed. 2d 1397 (1960).

³ *Hanover Fire Ins. Co. v. Bennett*, No. 13, 348 P. 2d 587 (Alaska 1960).

be discussed briefly before attempting to deal with the many issues presented by these cases.

Since time immemorial Alaska has been blessed with a natural food resource in the form of annual migrations of salmon. From late spring until fall most of its fresh water rivers, and streams are, at one time or another visited by hordes of salmon that have migrated shoreward from the open sea. After periods varying from two to eight years at sea the homecoming salmon have increased in size from fingerlings to maturity and to weights ranging to sixty pounds and above in some species. As a life sustaining food the salmon is hardly excelled and because of its abundance in Alaskan waters it has always been one of the basic food resources of the people as well as the basis of their main industry. Responding to instinct the sea matured salmon seasonally form in huge schools in the sea enroute to the mouths of the fresh water rivers and streams they will soon enter. At a time dictated by instinct, but governed to some extent by water conditions and other factors, the schools then commence a mass movement from the sea toward the mouths of the rivers and streams. It is at this point in their migration that they are caught in great quantities by the fishing methods to be mentioned. Those escaping nets and traps proceed up the rivers and tributary streams to the place of their spawning where they in turn spawn and with few exceptions die.⁴

Harvesting some portion of this natural resource for food has always been an annual necessity for most of the native population and many of the white settlers. Commercial salmon fishing is the principal source of income for a large portion of Alaska's labor force. With the coming of the white man primitive methods of catching salmon gave way to what are generally considered the three most

⁴ See Barnaby, Fluctuations in Abundance of Red Salmon of the Karluk River, Alaska 247-60 (Fishery Bulletin No. 39, 1944) (from 50 Fishery Bulletin of the Fish and Wildlife Service 237-95).

efficient methods. (1) gill nets—consisting of lengths of net strung between buoys secured to the tidelands floor by lines and stakes, with the nets usually going dry at low tide; (2) purse seines—where nets are maneuvered around congregations of fish in deep water by the use of powered boats; (3) fish traps—unquestionably the most productive method of catching salmon ever used. A trap consists of tall stakes or mechanically driven piling extending from the shore to varying distances seaward, depending on the depth of the water. Wire or webbing is stretched across the stakes or piling from the shore to the seaward end and from the ocean bottom upward to a point above high water. Located at the seaward end is an extended wing or hook and an opening into the heart and pot. When the webbing is on the ocean bottom fish cannot pass around the trap at the shoreward end. One tendency of migrating fish is to parallel the shoreline and travel with the incoming tide. Fish stopped by the webbing of a trap will eventually follow it seaward in an attempt to by-pass the obstruction. The wing or hook is constructed so as to discourage by-passing and divert the fish into the heart and pot where they remain. With some variations in construction, floating traps adapted to deep water are commonly used and are highly productive.

Public opposition to the trap appeared in Alaska when it became obvious that the fishery resource was being depleted.⁵ Opponents claimed that traps wiped out entire schools of salmon headed for specific streams; that even when this did not happen they trapped an excessive percentage of the fish of a given school; that they trapped not

⁵ Statistics contained in the International Yearbook Number of Pacific Fisherman, Jan. 25, 1961, p. 27, show that commencing with a total pack of 1,894,516 cases in 1905 the fisheries of Alaska were exploited to a peak pack of 8,454,948 cases of salmon in 1936. From 1936 onward the total pack gradually decreased to 1,778,339 cases in 1959, the lowest in the history of the industry. The total pack in 1960 was 2,550,027 cases.

only salmon but also fish of many other species, which, once trapped, died in the pot without being utilized for any purpose. Proponents, on the other hand, argued that the very efficiency of traps commended their use; that they produced a more marketable product because the fish were killed with less violence and reached the cannery sooner and fresher; and that the dwindling yearly salmon runs were the result of overfishing by all methods.

The authority granted to the Territory of Alaska by the Organic Act of 1912⁶ did not extend to the regulation of fish and game. From 1906 until 1924 such regulation of the Alaska fisheries as occurred was directed by the Secretary of Commerce.⁷ The White Act of June 6, 1924,⁸ broadened the scope of the regulatory power. Under Reorganization Plan No. II in 1939 the responsibility for administering the act was transferred to the Secretary of the Interior.⁹ The use of fish traps was permitted by regulation along specific areas of the coastline. The right to construct and operate a trap in any area declared to be available for trap fishing was open to all. Trap sites were never designated by the Secretary as belonging to any person or group prior to his granting of trap site privileges to appellants on March 7, 1959. The spacing between traps, and other regulations prescribed, resulted in limiting the number of trap site locations available within a given area. The legal prerequisites to operating a fish trap were that the trap be located in an area open to the use of traps, that the operator have a War Department permit to construct an obstruction to navigation, and after the Territory was organized, a fish trap license issued by the Territory

⁶ 37 Stat. 512, 48 U.S.C.A. § 24 (Supp. 1960) [§ 4-2-3 ACLA Cum. Supp. 1957].

⁷ Act of June 14, 1906, ch. 3299, § 5, 34 Stat. 264.

⁸ 43 Stat. 464, 48 U.S.C.A. § 221 (1952).

⁹ 1939 Reorganization Plan No. II, 53 Stat. 1433.

of Alaska. The annual cost of constructing a trap varied between several thousand dollars for a hand driven stake trap to in excess of ten thousand dollars for a pile driven trap. The cost of construction and operation excluded the average Alaska fisherman from its use and in time the operation of fish traps became generally concentrated in the cannery operators and owners, it not being uncommon for a cannery corporation to own several dozen traps.¹⁰ Fish traps were bought and sold. With few exceptions the right of the purchaser to annually erect and operate the trap on the tideland location previously occupied by the seller was not questioned by other persons because of a custom and usage observed by Alaska fishermen, that if the person who fished a given tideland location the previous year timely returned and prepared to fish that location the following year, his moral priority would be respected. Legally, all that could be sold was the apparatus and equipment used in the trap. Alaska courts have consistently held that no person could acquire a vested right in a tideland fishing location and that the first person to timely commence the erection of a trap was entitled to fish that location for that year, if the trap was completed and ready to fish on the opening day of the season.¹¹ The same customs were generally observed and the same law, with slight variations, governed with regard to gill net tideland fishing sites.¹² The only instance, prior to Statehood, of an acquisition by any person or group of an exclusive right to operate a fish trap in Alaska waters is that which came to the Metlakatla Indians through a combination of unusual circumstances, which will be discussed later in this opinion.

¹⁰ Gruening, *The State of Alaska* 395 (1954).

¹¹ *Fisher v. Everett*, 11 Alaska 1, 66 F. Supp. 540 (D. Alaska 1945); *General Fish Co. v. Markley*, 13 Alaska 700, 105 F. Supp. 968 (D. Alaska 1952); *Thlinket Packing Co. v. Harris & Co.*, 5 Alaska 471 (D. Alaska 1916).

¹² *Lind v. Markley*, 13 Alaska 665, 105 F. Supp. 50 (D. Alaska 1952).

The very first session of the Alaska Territorial Legislature in 1913 memorialized Congress for legislation which would limit the fishing efficiency of the trap.¹³ In 1913, 1915, and regularly thereafter, the Territorial Legislature memorialized Congress that no legislation be enacted whereby any right or title to any fish trap site in Alaska waters be granted.¹⁴ In 1921 the Territorial Legislature memorialized Congress, attributing the diminishing salmon supply to the use of fish traps and requesting regulation of that method of fishing.¹⁵ In 1924 Mr. Sutherland, Alaska's delegate to Congress, testified before a Congressional Committee during hearings on the White Act as follows:

"... when the fish are congregated in one body moving toward the parent stream if by accident they come in contact with a trap lead and the lead fish enters the trap it is more than probable that the entire supply of that stream to the last fish is taken, and therefore a great many of the smaller streams in Alaska are barren of fish, and any number of men in Alaska will tell you by the method of the trap the entire supply is exterminated."¹⁶

The number of fish traps permitted under the Secretary's regulations ran into the several hundreds. Regular memorials to Congress recommending complete abolition of fish traps were passed by the Alaska Territorial Legislature commencing in 1931.¹⁷ At least one unsuccessful at-

¹³ SLA 1913, Senate Joint Memorial No. 26, at 413.

¹⁴ SLA 1915, Senate Joint Memorial No. 16, at 222.

¹⁵ SLA 1921, House Memorial No. 1, at 181.

¹⁶ 65 Cong. Rec. 5966 (1924).

¹⁷ SLA 1931, House Joint Memorial No. 6, at 275, points out the prejudicial effect on the development of the Territory caused by the use of floating and standing fish traps and requests that the power to determine the methods to be employed in catching salmon be given to the Territorial Legislature.

tempt was made to tax the fish trap out of use.¹⁸ In 1948 a referendum by the people of Alaska resulted in a vote of 19,712 to 2,624 in favor of abolition of fish traps.

On February 5, 1956, the Alaska Constitutional Convention adopted the Constitution of Alaska. Article VIII, section 15 stated:

"No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State."

Ordinance No. 3 of that constitution dealt exclusively with fish traps and provided that each elector who voted on ratification of the constitution could, on the same ballot, vote for or against adoption of Ordinance No. 3, which prohibited the use of fish traps for the taking of salmon for commercial purposes in the coastal waters of the state. The ordinance provided that if it were adopted by a majority vote, then on the effective date of the constitution the following should become operative:

"As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

The vote of the people of Alaska on April 24, 1956 was 21,285 to 4,004 in favor of adopting Ordinance No. 3.

On July 7, 1958, Congress passed the Alaska Statehood Act providing for the admission of Alaska into the Union.¹⁹

¹⁸ P. E. Harris & Co. v. Mullaney, 12 Alaska 476, 480, 87, F. Supp. 248 (D. Alaska 1949).

¹⁹ 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959).

Section 6(e)²⁰ of this act provided in part that the administration and management of the fish and wildlife resources of Alaska should be retained by the federal government, under existing laws, until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior had certified to the Congress that the Alaska State Legislature had made adequate provision for the administration, management, and conservation of the said resources in the broad national interest.

Alaska became a state on January 3, 1959.²¹ The Alaska State Legislature met immediately thereafter and on February 25, 1959 a law became effective making it unlawful to erect, moor or maintain fish traps.²² On March 7, 1959 the Secretary of the Interior issued an order prohibiting the use of fish traps in Alaska, to be effective on April 18, 1959,²³ but excluding fish traps at Metlakatla, Kake and Angoon as enumerated, a total of eleven traps. The order recited as its authority, section 1 of the White Act.²⁴ The

²⁰ Quoted p. 48 *infra*. [p. 41a this appendix]

²¹ Exec. Proclamation No. 3269, 24 Fed. Reg. 81 (1959).

²² SLA 1959, ch. 17 (quoted p. 37 *infra*).

²³ 50 C.F.R. §§ 101.1-130.10 (Supp. 1960) (commercial fisheries regulations for Alaska).

²⁴ 43 Stat. 464 (1924), 48 U.S.C.A. § 221 (1952):

"For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable."

Secretary's theory was that under section 6(e) of the Alaska Statehood Act²⁵ he was required to manage Alaska's fish and wildlife until the state took over that responsibility, that on January 3, 1959 when the act became effective, Ordinance No. 3 also became effective and required that he abolish all fish traps in Alaska since he was acting in a dual capacity as trustee-administrator to enforce the laws of the state and federal government. The Secretary interpreted the wording "under existing laws" in section 6(e) as including Ordinance No. 3, which, under his theory, amended the White Act. The Secretary's action and views were upheld.²⁶ The validity of his act in excluding appellants' traps from the effect of the order was not before the court.

On April 17, 1959 a comprehensive act establishing an organization for the management of Alaska's fish and game resources was enacted by the first state legislature.²⁷ On the same date an act prohibiting the operation of fish traps within the state, amending the previous act on fish traps²⁸ and prescribing penalties became effective.²⁹ On May 21, 1959 the Governor of Alaska wrote to the Secretary of the Interior pointing out that Ordinance No. 3 prohibited fish traps, native owned or otherwise, that the state legislature had made operation of fish traps a crime, that regulation 115.26 of the order of March 7, 1959, permitting fish traps on the tidelands or submerged lands of Alaska would impair the sovereign rights of the State of Alaska and that state officials had been instructed to enforce the constitu-

²⁵ Quoted p. 48 *infra*. [p. 41a this appendix]

²⁶ *Ketchikan Packing Co. v. Seaton*, 267 F.2d 660 (D.C. Cir. 1959).

²⁷ SLA 1959, ch. 94.

²⁸ SLA 1959, ch. 17 (quoted p. 52 *infra*). [p. 44a this appendix]

²⁹ SLA 1959, ch. 95 (quoted p. 52 *infra*). [p. 44a this appendix]

tion and laws. He asked that the Secretary reconsider regulation 115.26.³⁰

³⁰ "May 21, 1959

Honorable Fred A. Seaton
Secretary of the Interior
Department of the Interior
Washington, D. C.

Dear Mr. Secretary:

"On March 7, 1959, you promulgated your amendments to the Alaska Fishery Regulation. Among the revision of regulations adopted was Section 115.26. The purpose of Section 115.26 Revised Regulation was to permit certain native owned or controlled fish traps to operate within Alaskan waters.

"Fish traps, native owned or otherwise, are prohibited by the Constitution of the State of Alaska:

'As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for [the] taking of salmon for commercial purposes is hereby prohibited in all [the] coastal waters of the State.'

"The Legislature of the State of Alaska has made operation of fish traps a crime within the State:

'Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tide-lands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

'Sec[ti]on 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$5,000.00 or by both such imprisonment and fine.' (Chapter 95, SLA 1959)

"The will of the people of Alaska to rid our waters of fish traps has been demonstrated repeatedly. In every referendum

on the question, the Alaskan people have voted overwhelmingly to abolish the fish traps.

"When the matter was submitted last to the electorate on the adoption of the State Constitution, the returns indicated that Alaskans had in no manner receded from their position.

"In the 1948 referendum, the Village of Kake voted 123 to 6; Angoon, 41 to 9; and Metlakatla, 112 to 33; for abolition of fish traps. These are the several native villages where you would now permit fish traps. These villages voted more recently against fish traps when that issue was referred to the people of Alaska in 1956.

"Since becoming Governor of Alaska, I have repeatedly announced that fish traps will not be permitted within the waters of Alaska. I have made no exceptions. These announcements have been carried in the press.

"As chief executive of the State of Alaska, I must enforce the Constitution and laws of the State. Since no exception is made either in the Constitution or the statutes of Alaska, no discretion is conferred on the executive.

"The Court of Appeals for the District of Columbia Circuit, No. 15075, in *Ketchikan Packing Company, et al. v. Fred A. Seaton, et al.*, has this to say:

"The Secretary read the words "under existing laws" in the Westland proviso as including Ordinance [No.] 3 of Alaska, and concluded that the Statehood Act which "accepted, ratified and confirmed" the Alaska Constitution, amended the White Act by prohibiting the use of such traps in Alaskan waters as set forth in the ordinance. In other words, the Secretary argues that the Congress did not intend that he should suspend the Alaskan ordinance, adopted by popular vote along with the Constitution, in the interim period while he administered the state's wildlife resources.

"One key consideration in the problem is that we are dealing with a transition measure—a temporary, not a permanent, provision. What was the intention of Congress concerning the interim transition period between federal territorial control and full statehood? In effect, the Westland proviso makes the Secretary a "trustee" for both the federal government and the new state "in [the] broad national interest" during the transition of administration from the federal to the state authorities. The Secretary, in that unique capacity, could not reasonably *disregard a valid law of Alaska* which was "existing" on January 3, 1959, the

On or about June 17, 1959 state officers arrested several persons and seized one trap on which pre-season work was

effective date of the Alaska Statehood Act which defined his powers over wildlife resources for the interim period commencing on that date.' (emphasis supplied)

"In its conclusion, the Court said:

'Of necessity, in this unique interim situation, the Secretary must apply a federal sanction to effect the *enforcement of a state law*. See footnote 3 *supra*. This apparent anomaly can be explained only by reference to the fact that in this transition of authority the Secretary is operating in a dual capacity.' (emphasis supplied)

"I have considered Section 4 of the Enabling Act (Public Law 85-508) which refers to native property (including fishing rights). My legal advisors have informed me that this provision protects the vested rights of natives. At no time in the courts of Alaska or elsewhere has fishing by traps been held to confer a vested or a property right."

"The fish traps which would be permitted under Revised Regulation 115.26 must be placed upon the tidelands or the submerged lands of Alaska. Therefore, the Regulation would impair or infringe upon sovereign rights of the State of Alaska.

"For the reasons here stated, I must now advise that I will stand firm in my resolve that fish traps will not be allowed within Alaskan waters. I have instructed the appropriate officers in the State to see that the State Constitution and law is enforced. If Revised Regulation 115.26 is left unchanged, it may mislead the native people who in reliance thereon may attempt to install or operate fish traps. I hope that loss of money and labor may be avoided. To that end, I ask that you reconsider Revised Regulation 115.26.

"I am convinced that continuing long term benefits far outweighing temporary gain will accrue to the very communities here involved by the early discontinuance of fish traps, and I submit to you that your announced intention last Fall to ban traps was applauded in these communities as it was elsewhere throughout Alaska.

"I shall be glad to discuss this matter with you personally or through authorized representatives at any time.

Sincerely yours,

William A. Egan
Governor of Alaska"

being performed. Actions for restraining orders were immediately commenced by appellants in the United States District Court for the District (Territory) of Alaska in Juneau.

After dismissal in that court, notices of appeal were filed with the Supreme Court of the United States on August 6, 1959. Notices of appeal were filed in this court as a precautionary matter after its organization. On February 19, 1960 an order was entered by this court holding all proceedings on the appeals in abeyance pending determination by the Supreme Court of the United States of the question of its jurisdiction over the appeals then pending in that court.

All three appellants contend that the Alaska constitution and statutes prohibiting fish traps are not applicable to them because, in adopting the constitution, the people of Alaska disclaimed right or title in or jurisdiction over Indian fishing rights and that the Alaska Statehood Act reserved absolute jurisdiction and control over Indian fishing rights to the United States.

Since most of the issues turn on the question of what rights Alaska disclaimed with respect to native fishing rights, we shall first address ourselves to that question in the knowledge that its answer will simplify solution of the other issues.

The road to Statehood for Alaska was long and difficult. The first bill providing for Statehood for Alaska was introduced in Congress in 1916. The first memorial to Congress from the Territorial Legislature petitioning for Statehood was passed in 1945.³¹ Regular petitions were made thereafter without success. Finally in 1955 the Territorial Legislature provided for a constitutional convention.³²

³¹ SLA 1945, House Joint Memorial No. 7, at 223; see SLA 1929, Senate Memorial No. 1, at 321.

³² SLA 1955, ch. 45.

Elected delegates adopted a constitution on February 5, 1956 which was ratified by the people on April 24, 1956. This constitution served as a basis for subsequent petitions to Congress for Statehood and can be considered as an offer to accept the privileges and responsibilities of that status in accordance with its terms.³³ The disclaimer provisions relied upon by appellants are contained in sections 12 and 13 of article XII.³⁴

Some two years and three months after the people of Alaska had adopted their constitution Congress passed the Alaska Statehood Act.³⁵ Section 1 provided that the State of Alaska would be admitted into the Union on an equal footing with the other states in all respects whatsoever, subject to the issuance of a proclamation required by section 8(c) of the act. Section 1 found that the Alaska con-

³³ *Boeing Aircraft Co. v. RFC*, 25 Wash. 2d 642, 171 P.2d 838, 842, appeal dismissed, 330 U.S. 803, 91 L. ed. 1262 (1947).

³⁴ "Section 12. The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States. They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress. This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.

"Section 13. All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people."

³⁵ 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959).

stitution was republican in form, in conformity with the Constitution of the United States and the principles of the Declaration of Independence, "... and is hereby accepted, ratified, and confirmed".

Section 4 of the Alaska Statehood Act is a direct response by Congress to the provisions contained in the five sentences of section 12 of article XII of the Alaska constitution. The two sections constitute a compact between sovereigns.³⁶ For purposes of comparison, each sentence of section 12 of article XII of the Alaska constitution is separately quoted immediately above that portion of section 4 of the Alaska Statehood Act which represents Congress' response to that sentence:

"The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union." (First sentence, section 12, article XII, Alaska Constitution.)

"As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, . . ." (Section 4, Statehood Act.)

A comparison of the offer with the response as above set forth indicates definite agreement as to the future status of United States property.

"The State and its people further disclaim all right or title in or to any property, including fishing rights, the

³⁶ Boeing Aircraft Co. v. RFC, *supra* note 33.

right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission." (Second sentence, section 12 of article XII, Alaska Constitution.)

"... and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; ...". (Section 4, Alaska Statehood Act.)

A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the state was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition by defining the right or title.

"The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States." (Third sentence, section 12, article XII, Alaska Constitution.)

"... that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation ...". (Section 4, Alaska Statehood Act.)

The above offer and response indicate agreement as to property, without specific mention of fishing rights.

"... *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect

any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act; . . .”.

This portion of section 4 of the Alaska Statehood Act has no direct relation to any of the sentences of section 12 of article XII of the constitution.³⁷

“They further agree that no taxes will be imposed upon any such property, until otherwise provided by the Congress.” (Fourth sentence, section 12 of article XII, Alaska Constitution.)

“This tax exemption shall not apply to property held by individuals in fee without restrictions on alienation.” (Fifth sentence, section 12 of article XII, Alaska Constitution.)

“ . . . And provided further, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.” (Section 4, Alaska Statehood Act.)

The fourth and fifth sentences and the response appear to have sufficient definiteness to be offers and acceptances.

³⁷ See one explanation of the reason for this proviso on page 37 of this opinion. [p. 31a this appendix]

Section 13 of article XII of the Alaska constitution is construed to be a blanket consent by Alaska to such proper reservations of rights or powers to the United States as may be contained in the act admitting Alaska to the Union.

The compact or contract between Alaska and the United States became effective upon approval of the terms of the Alaska Statehood Act by the voters of Alaska.³⁸ Section 8(b) of the Alaska Statehood Act required that three propositions be submitted to the qualified voters of Alaska. Only the third proposition is of interest here.³⁹ This proposition was approved by a vote of 40,739 to 7,500 on August 26, 1958. On June 25, 1959 Congress enacted the Alaska Omnibus Act. Section 2(a) amended that portion of section 4 of the Alaska Statehood Act which was a response to the third sentence of section 12, article XII of the Alaska constitution.⁴⁰

Appellants argue that the amendment is a part of the compact and merely clarified the original intent of Congress. We cannot accept this reasoning. It is our view that the amendment forms no part of the compact between Alaska and the United States. It was not enacted until

³⁸ *Stearns v. State*, 179 U.S. 223, 244-45, 45 L. ed. 162, 174 (1900).

³⁹ "(3) All provisions of the Act of Congress approved reserving rights or powers to the (date of approval of this Act)

United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

⁴⁰ Alaska Omnibus Act § 2(a), 73 Stat. 141 (1959) reads:

Section 4 of the Act of July 7, 1959 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words 'all such lands or other property, belonging to the United States or which may belong to said natives', and inserting in lieu thereof the words 'all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives'."

ten months after the voters of Alaska had ratified the compact, six months after Alaska had attained Statehood, and three days after these controversies had arisen. This portion of section 4 reserves absolute jurisdiction and control in the United States. As originally enacted it applied only to "lands or other property". As amended, it purports to include fishing rights. In the portion of section 4 immediately preceding, fishing rights were parenthetically included. It is only logical to assume that if it had been intended that fishing rights be included in the section following, along with "lands or other property", the same phraseology would have been employed. The conciseness of and correlation between the pertinent sentences of the Alaska constitution and the responding portions of section 4 leave no room for the construction appellants urge.

What right or title to Indian fishing rights might the state have disclaimed under the terms of the second sentence of section 12, article XII and the responding portion of section 4, assuming there was a sufficient area of agreement to create a compact on this subject? The state offered to disclaim as to right or title "held" by or for the persons named. The response described the right or title as "held" by or for natives. There is no evidence of an intent on the part of either sovereign that any new or additional rights in fishing rights be established by the compact itself. The question then becomes one of what "right or title" to fishing rights was "held" at the time the compact was formed.

A review of all known legislation enacted by Congress since the purchase of Alaska from Russia that might have established a "right or title" in Alaska natives shows that Congress evidenced some concern for the natives by permitting them to kill fur seals for their needs,⁴¹ and permit-

⁴¹ Act of April 22, 1874, ch. 122, 18 Stat. 33; Act of April 6, 1894, ch. 57, § 1, 28 Stat. 52; Act of April 21, 1910, ch. 183, § 6, 36 Stat. 327; Act of Aug. 24, 1912, ch. 373, § 3, 37 Stat. 500; Act of Feb. 26, 1944, ch. 65, § 3, 58 Stat. 101.

ting them, along with miners, prospectors, explorers and travelers, to kill game out of season when in absolute need of food and no other food was available.⁴² The Act of May 17, 1884,⁴³ establishing a civil government in Alaska provided:

"... That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

This provision was not confined to Indians. The first act of Congress with respect to fisheries in Alaska was passed on June 14, 1906,⁴⁴ making it unlawful for a non-citizen, or one who had declared his intention but was a non-resident, or any company not organized under the laws of the United States or of a state, or any person not a native of Alaska, to catch fish except with rod, spear or gaff. In the same year the first act to regulate commercial fisheries was passed.⁴⁵ This act taxed fishing enterprises, exempting those who operated hatcheries for restocking, restricted the use of nets and seines, provided for closed periods and penalties for violations, but made no mention of the natives.

Section 1 of the White Act⁴⁶ stated that its purpose was that of "... protecting and conserving the fisheries of

⁴² Act of June 7, 1902, ch. 1037, § 1, 32 Stat. 327, as amended by Act of May 11, 1908, ch. 162, § 1, 35 Stat. 102; Act of Jan. 13, 1925, ch. 75, § 10, 43 Stat. 744, as amended by Act of Feb. 14, 1931, ch. 185, § 10, 46 Stat. 1113 (exemption from license requirement), as amended by Act of June 25, 1938, ch. 686, § 4, 52 Stat. 1171.

⁴³ Ch. 53, § 8, 23 Stat. 25.

⁴⁴ Ch. 3299, 34 Stat. 263.

⁴⁵ Act of June 26, 1906, ch. 3547, 34 Stat. 478.

⁴⁶ Ch. 272, 43 Stat. 464 (1924), 48 U.S.C.A. §§ 221-222 (1952).

the United States in all waters of Alaska. . . ." The Secretary of Commerce was required to regulate the fisheries,

"Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . ." (Emphasis added.)

The emphasized portion of the above quoted section was generally the law of Alaska prior to enactment of the White Act.⁴⁷ This section precludes the possibility that the Secretary might have created any rights in natives subsequent to its enactment in 1924. On the only occasion that the Secretary of the Interior ever attempted to create an exclusive right of fishery in Alaskan Indians, with the exception of the cases under consideration, the United States Supreme Court said through Mr. Justice Reed:

*"It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate the Alaska fisheries permanently from public control."*⁴⁸

In 1934 Congress, by amendment of earlier acts, permitted the taking of king salmon in the Kuskokwim and Yukon rivers for commercial purposes, but limited such taking to Indians and bona fide white inhabitants.⁴⁹

⁴⁷ *Tlingit Packing Co. v. Harris*, 5 Alaska 471 (D. Alaska 1916).

⁴⁸ *Hynes v. Grimes Packing Co.*, 12 Alaska 348, 370-71, 337 U.S. 86, 105, 93 L. ed. 1231, 1248 (1949).

⁴⁹ Act of April 16, 1934, ch. 146, § 1, 48 Stat. 595.

Our search leads us to the belief that no act of Congress had established any "right or title" in fishing rights which were "held" by or for natives at the time the compact was made. Whatever hunting or fishing privileges Congress has extended to natives in the past have been equally applicable to the white residents. Natives and whites have always fished as equals in Alaska. This is understandable and is as it should have been. A remote wilderness could never have been populated to any extent with permanent white residents if they had not been accorded at least an equal opportunity with the natives to obtain subsistence from the fish and game resources. This policy and the basic reasoning is still applicable to a substantial portion of the state. The white settlers of innumerable communities and settlements in Alaska would be immediately forced to give up residence if they were not permitted to hunt and fish with the natives as equals. Such equality has not worked to the disadvantage of the native. Wherever the white man has introduced modern equipment or methods, the native has quickly adapted them to use in his environment with as great, if not a greater, facility than the white resident of the same area. Fish traps, however, are an exception. Neither the native nor the permanent white resident of Alaska has ever owned fish traps to any extent. The original cost of construction plus payroll and maintenance effectively precluded them. Though traps have been the most effective means of commercial exploitation of the fisheries, their use did not seem to be important to the seasonal efforts of the natives or the white residents to acquire a subsistence from the fisheries until the supply began to be seriously depleted. Of course, the controversies before us extend beyond that of a right to fish for mere subsistence. The right alleged to have been disclaimed by the state and reserved to the United States is said to be extensive enough to permit the Secretary of the Interior to authorize wholesale commercial exploitation of the fisheries by the use of traps.

We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time.

Appellants say the claimed reservation to the United States of absolute jurisdiction and control over Indian fishing in Alaska by section 4 of the Alaska Statehood Act, as amended, transcends the police power of the state under the supremacy clause of the United States Constitution; that it does not violate the equal footing doctrine and is a legitimate exercise of Congress' power to regulate commerce with the Indian tribes.

The power of a state to control and regulate the taking of game within its borders was recognized by the Supreme Court of the United States in *Geer v. Connecticut*.⁵⁰ After reviewing the Civil and English common law, that court found the power to be an attribute of government, recognized and enforced by the common law of England, present in the colonial governments where not denied by charters and passed on to the states where it remains. In defining the power the court said:

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of

⁵⁰ 161 U.S. 519, 40 L. ed. 793 (1896).

private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 41 U.S. 16 Pet. 410 [10:1012], represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the state, are thus stated in a well considered opinion of the supreme court of California: 'The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic and commerce in it, if deemed necessary for its protection or preservation, or the public good.' Ex parte Maier, *ubi supra* [103 Cal. 476].'⁵¹

The abolition of fish traps by a state in the exercise of its police power is not new to the law. In upholding an act of the New York legislature which abolished fish pounds in 1883 the Supreme Court of the United States said through Mr. Justice Brown:

"The duty of preserving the fisheries of a state from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

"... The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future.'⁵²

⁵¹ Id. at 529, 40 L. ed. at 797.

⁵² *Lawton v. Steele*, 152 U.S. 133, 139, 38 L. ed. 385, 389 (1894).

A Maryland statute prohibiting purse seining for menhaden within three miles of its shores for conservation reasons was upheld as a valid exercise of its police power under the Submerged Lands Act.⁵³ The complete abolition of traps for the taking of salmon, with the exception of the traps here in controversy, was upheld in *Ketchikan Packing Co. v. Seaton*.⁵⁴

The absolute jurisdiction claimed to be reserved in the United States is the right to regulate and control all fishing by Indians anywhere in Alaska. There are natives in all parts of Alaska. Approximately 42 per cent of the fishing population reported in the 1950 census were natives. If the full scope of the claimed power were eventually exercised by the Secretary of the Interior, only permanent chaos and conflict could result. The magnitude of the power claimed is such that the effect could be to render useless or futile any effort by the state to regulate. In *New York ex rel. Kennedy v. Becker*,⁵⁵ the Supreme Court of the United States said of a situation where it was proposed that the interpretation of a treaty with the Seneca Indians be that the state would regulate fishing by the whites, on lands not on the Seneca reservation, but previously ceded by them, and the Indian tribe would regulate its members:

"It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essen-

⁵³ *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md.) (3-judge court), aff'd mem., 355 U.S. 37, 2 L. ed. 2d 70 (1957).

⁵⁴ 267 F. 2d 660 (D.C. Cir. 1959). See also *Dow v. Ickes*, 123 F.2d 909 (D.C. Cir. 1941), cert. denied, 315 U.S. 807, 86 L. ed. 1206 (1942).

⁵⁵ 241 U.S. 556, 60 L. ed. 1166 (1916).

tial power of preservation, would in fact deny it to both."⁵⁶

The reasoning of *New York ex rel. Kennedy v. Becker* is particularly applicable to the cases before us. The salmon from the sea that pass by the islands upon which appellant communities are located are bound for the many fresh water streams that empty into the inland waters, not only from the islands, but from the mainland coast of Southeastern Alaska as well. They are not the product, for the most part, of the fresh water, streams near where they are caught. The schools, in many instances, still have many miles of inland sea and fresh water to traverse before they reach the stream or lake bed where they were spawned. Control of fishing, by enforcement officers advised by biologists experienced in the escapement requirements of each spawning area, is an absolute necessity if preservation and re-building of the depleted runs is to be accomplished. Each main school is generally identified by the biologists as to species, spawning destination and other characteristics. Stream escapement counts are maintained as well as a current count of the catch. The amount of commercial fishing permitted within the run of a given species destined for a given area is regulated, during the run, by trained officials governed by one central policy.⁵⁷ Dual regulation is impracticable. These migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state.

The Secretary authorized appellants to fish with eleven traps in 1959. The number of traps he will authorize in

⁵⁶ Id. at 563, 60 L. ed. at 1171-72.

⁵⁷ See Davidson & Christey, *The Migration of Pink Salmon in the Clarence and Sumner Straits Regions of Southeastern Alaska* (Bureau of Fisheries Bulletin No. 25, 1938) (from Bulletin of the Bureau of Fisheries 643-66).

future years and their locations will depend upon factors paramount to him. Under the power claimed the number could be without limit and in any area, as long as the right was exercised in behalf of Indians. It has not been unusual for a single trap to catch as many as 600,000 fish in a single season.⁵⁸ The impact of the catch of eleven traps on the fisheries of Southeastern Alaska is considerable from the point of view of conservation. The season's catch of a gill net or purse seine fisherman in the same area might run from 2,000 to 10,000 fish respectively. The discrimination against all fishermen, natives and whites alike, resulting from the Secretary's 1959 regulation, creates social problems for the state which it is powerless to remedy if the Secretary's claimed right is upheld. The intention to retain such a power over the basic industry of the state was not intimated in the wording of the Alaska Statehood Act, much less described. Such a power has never been reserved as to any other state admitted into the Union as far as this court is aware. The fisheries of Alaska, although pitifully depleted, are still its basic industry. The economy of the entire state is affected, in one degree or another, by the plenitude of the salmon in a given season. The preservation of this natural resource is vital to the state and of great importance to the nation as a whole. The law is so well settled that it can provoke no argument to state that as a general welfare measure a state can prohibit the use of traps for the taking of fish. Ordinance No. 3 is a welfare measure. Its objects are stated to be the relief of economic distress among fishermen, to conserve the dwindling supply of salmon and insure fair competition in commercial fishing. Alaska had every right to adopt such a policy, applicable to natives and whites alike, unless its police power with respect to natives while fishing had been rightfully curtailed.

⁵⁸ Alaska Pac. Fisheries v. United States, 4 Alaska Fed. 709, 248 U.S. 78, 63 L. ed. 138 (1918).

In *Ward v. Race Horse*⁵⁹ the Supreme Court of the United States decided that a treaty between the United States and the Shoshonees and Bannock tribes which provided that those Indians “... shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon...”⁶⁰ gave way to the equal footing doctrine. The right given to the Indians was found to be repugnant to the rights of Wyoming, admitted into the Union after the treaty. Race Horse had killed seven elk on unoccupied land belonging to the United States, not within his reservation, but in violation of the game laws of Wyoming. This decision, in unequivocal terms, decided that if the treaty were upheld, Wyoming would be without a power possessed by all states, that of regulating the killing of game within its borders. It was argued that since the United States had the right under the Constitution to regulate commerce with the Indian tribes, it therefore had the right to exempt specific property owned by it from the game laws. The court observed that the enabling act was silent as to the reservation of any rights in favor of the Indians and that even though Congress had full authority to charge the territory with such burdens, which would continue after admission, it had not expressly done so. Race Horse had not violated any of its terms, but the treaty was required to give way to the rights of the State of Wyoming. In the act setting up a temporary territorial government for Wyoming, Congress had provided that nothing in the act was to impair “the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians”.⁶¹ The act of admission contained no exception in favor or for the benefit of the Indians. These

⁵⁹ 163 U.S. 504, 41 L. ed. 244 (1895).

⁶⁰ *Id.* at 505, 41 L. ed. at 245.

⁶¹ *Ibid.*, quoting 15 Stat. 178 (1868).

circumstances are mentioned by appellants as distinguishing *Race Horse* from the cases at bar, because of the disclaimer provisions in the Alaska constitution and the wording of section 4 of the Alaska Statehood Act. Persuasive against such a classification of *Race Horse* is the fact that Alaska in its constitution offered to disclaim only as to fishing rights defined in the act of admission. No Indian fishing rights were defined in the act and none were held by or for them. The treaty of the United States with the Shoshonees was the law of the land at the time of Wyoming's admission and conceivably could have been construed as binding on Wyoming although not specifically mentioned in the act of admission, had it not been found to be inferior to Wyoming's right to be admitted on an equal footing with the other states of the Union. The court specifically stated that it was influenced by the obvious intent of Congress, expressed indirectly by failing to mention any reservation.⁶²

We are advised by the United States' brief, submitted as a friend of the court, that the term "(including fishing rights)" was written into section 4 over the objection of the Department of Justice and that as a result, that department then insisted that the first proviso be added in order to make doubly certain that no compensable rights in favor of Indians were being established or recognized⁶³. The brief further states that in the view of the United States the "fishing rights" reserved were not true property rights, but merely fishing privileges. With that view

⁶² 163 U.S. at 515, 41 L. ed. at 248.

⁶³ The United States' brief refers to the original draft and that portion of section 4 which is a response to the second sentence of section 12 of article XII of the Alaska constitution. The term "(including fishing rights)" was also added to the following portion of section 4 which is a response to the third sentence of section 12 of article XII of the Alaska constitution but this was not done until June 25, 1959. See pages 20, 21, of this opinion. [pp. 17a, 18a of this appendix]

Race Horse becomes even more persuasive and leaves no doubt as to the direct course the court would have taken in deciding the case if an undefined fishing privilege had been involved rather than a specific hunting right secured by treaty.

Appellants rely on *United States v. Sandoval*⁶⁴ and *United States v. Kagama*⁶⁵ as precedent for the argument that Congress' power to regulate commerce with Indian tribes extends to the Indians of Alaska.

In *United States v. Sandoval*, the enabling act for New Mexico required the state constitutional convention to provide by ordinance against the introduction of liquor into Indian country, which was defined as including all lands then owned or occupied by the Pueblo Indians of New Mexico. An act of Congress in 1897 had already prohibited the introduction of liquor into the area. The question was whether the enabling act requirement violated the equal footing doctrine. The court cited with approval that portion of the holding in *Coyle v. Smith*⁶⁶ stating that any regulation provided for in an enabling act concerning commerce or commerce with Indian tribes will derive its force, not from the compact with the proposed new state, but solely because the power of Congress extended to the subject. In holding that the twenty pueblos scattered over the state were subject to the prohibition and that neither the Act of 1897 nor the enabling act was a violation of the equal footing doctrine,⁶⁷ the following factors were specifically considered by the court as proof that Congress

⁶⁴ 231 U.S. 28, 58 L. ed. 107 (1913).

⁶⁵ 118 U.S. 375, 30 L. ed. 228 (1886).

⁶⁶ 221 U.S. 559, 55 L. ed. 853 (1911).

⁶⁷ At 231 U.S. at 49, 58 L. ed. at 115, the court said:

"... [T]he legislation in question does not encroach upon the police power of the state, or disturb the principle of equality among the states."

had the power under the constitution to regulate the Pueblos and had historically exercised it:

1. The lands comprising the pueblos were held by them in communal fee simple under grants from the King of Spain later confirmed by Congress.

2. The peoples lived in isolated communities under primitive conditions and were governed chiefly by crude customs inherited from their ancestors.

3. It was questionable whether they were United States citizens.

4. They had been historically treated as wards of the United States—were furnished with the implements of civilization, were provided with training schools and an attorney to represent their interests, and were exempt from taxation.

5. They were forbidden by New Mexico law from voting except for the election of overseers of irrigation ditches and of the officers of their pueblos.

6. The Constitution authorized Congress to regulate commerce with the Indian tribes and historically it had exercised a fostering care over all dependent Indian communities within United States borders.

7. The court approved the doctrine of *United States v. Kagama*.

8. Congress had a right to determine for itself when guardianship which had been maintained over the Indians should cease.

9. From 1854 onward the United States had treated the Pueblos as other Indian tribes in the United States.

The Court stated, however:

"Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an In-

dian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."⁶⁸

In comparing the facts of the past and present status of the Indians of Alaska with those considered controlling in *Sandoval* we find the following:

1. No land encompassing Indian fishing rights, or otherwise, is held by any Indians in Alaska in communal fee simple. The United States has never entered into any treaty or similar type agreement with any group of Indians in Alaska. There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law. No permanent reservations have ever been created for Indians in Alaska.

2. The villages of Kake and Angoon are populated largely by people of Tlingit Indian ancestry. They are not located on temporary reservations. The Tlingits occupied the greater part of what is now known as Southeastern Alaska at the time of the coming of the Russians. They spoke a single language. Organizationally they consisted of two large moieties, each moiety consisting of numerous clans. There was no tribal organization as that term is generally understood although they lived under a definite social structure.⁶⁹ They adapted quickly to the white man's way of life and long ago discarded primitive customs which served no useful purpose. The City of Kake was incorporated as a first class city under territorial law in 1952 and governs itself with an elected mayor, council and school board. The Village of Angoon was incorporated under territorial law many years ago and governs itself

⁶⁸ 231 U.S. at 46, 58 L. ed. at 114.

⁶⁹ *Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 454-55 (Ct. Cl. 1959).

in much the same fashion. Both communities were provided with public schools by the territory and now are by the State of Alaska.

3. Some ancestors of the present residents of Kake and Angoon may have acquired citizenship under the Treaty of Cession with Russia in 1867;⁷⁰ all had the opportunity to acquire citizenship under the Act of February 8, 1887, which provided for the allotment of land to Indians as a means of obtaining citizenship⁷¹ where they did not reside on reservations. An additional means of obtaining citizenship was afforded them in 1906.⁷² In the second session of the Territorial Legislature in 1915 every native Indian was again given the privilege of becoming a citizen.⁷³ All Indians born within the territorial limits of the United States were declared to be citizens of the United States in 1924.⁷⁴ The Metlakatlans were granted citizenship by Congress in 1934.⁷⁵

⁷⁰ Act of June 20, 1867, art. III, 15 Stat. 539, in pertinent part provides:

"Citizenship of inhabitants; Uncivilized tribes. The inhabitants of the ceded territory . . . may return to Russia . . . but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens. . . . The uncivilized tribes will be subject to such laws and regulations as the United States, may from time to time, adopt in regard to aboriginal tribes of that country." See in *Re Minook*, 2 Alaska 200 (D. Alaska 1905).

⁷¹ Ch. 119, 24 Stat. 388, as amended by ch. 868, 31 Stat. 1447 (1901), ch. 2348, 34 Stat. 182 (1906).

⁷² Act of May 8, 1906, ch. 2348, 34 Stat. 182.

⁷³ SLA 1915, ch. 24.

⁷⁴ Act of June 2, 1924, ch. 233, 43 Stat. 253 (now covered by 8 U.S.C.A. § 1401 [1952]).

⁷⁵ Act of May 7, 1934, ch. 221, 48 Stat. 667 (now covered by 8 U.S.C.A. § 1401 [1952]).

4. Neither the residents of Kake and Angoon nor their Tlingit ancestors have ever been treated as wards of the United States. The implements of civilization, such as guns, boats, outboard motors, nets, clothing, and home building materials, useful in their economy were quickly acquired by them from the white man and adapted to their use. Certain assistance has been given to appellant communities under the Act of May 1, 1936,⁷⁶ which provided that certain sections of the Wheeler-Howard Act⁷⁷ would apply to Alaska, to groups of Indians not theretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district. These groups were permitted to organize, adopt constitutions and by-laws and receive charters of incorporation and federal loans under the Wheeler-Howard Act. None of the Indians of appellant communities have ever been exempt from taxation by the Territory or State of Alaska. Secretary of Agriculture Benson had the following to say in 1954 concerning the mode of life of the Indians of South-eastern Alaska:

"The mode of life for the southeast Alaskan Indian is much the same as that of the whites. The Indians live either in villages of their own or in the principal towns such as Craig, Juneau, Ketchikan, Petersburg, Sitka, and Wrangell . . . The Indian lives in the same type of residence as the white man, wears similar clothes, and eats similar food. He is a citizen and a voter. He works along side of and in competition with white citizens at the available local vocations. Both Indians and whites take wood for domestic purposes from national forest land (Without permit or payment) but otherwise make little use of the forest areas. Fishing for food is done in saltwater, not in the fresh water streams. Both white men and Indians trap

⁷⁶ 49 Stat. 1250, 25 U.S.C.A. § 473a (Supp. 1960).

⁷⁷ 48 Stat. 984 (1934), as amended, 25 U.S.C.A. §§ 461-79 (Supp. 1960).

and hunt over the same areas. The Indians adjustment to the white man's way of life is about complete."⁷⁸

In 1952 the following judicial comment was made on the same general subject:

"... [T]he Indians of Southeastern Alaska, and particularly the Haidas, have not only abandoned their primitive ways and adopted the ways of civilized life but are now fully capable of competing with the whites in every field of endeavor.... It is a matter of common knowledge that today the Indians of Southeastern Alaska prefer the white man's life despite all of its evils and shortcomings."

"... Whatever may be said in justification of reservations in the unsettled regions of Alaska, they are viewed as indefensible in Southeastern Alaska, and generally condemned by whites and Indians alike as racial segregation and discrimination in their worst form."⁷⁹

Amalgamation of the natives with the whites commenced at an early date and comparable progress has been made in other regions of Alaska as well.⁸⁰

5. In providing for the organization of the Territory of Alaska in 1912 Congress defined the right to vote and

⁷⁸ Brief for Appellee pp. 60-61, quoting from Report of Secretary of Agriculture Benson to Chairman, Committee on Interior and Insular Affairs, Jan. 11, 1954 (see Committee on Interior and Insular Affairs, 83d Cong., 2d Sess., Supplemental Reports of Jan. 11, 1954 on H.R. 1921, at 5-6).

⁷⁹ United States v. Libby, McNeill & Libby, 14 Alaska 37, 41, 42, 107 F. Supp. 697, 699 (D. Alaska 1952).

⁸⁰ See In Re Minook, 2 Alaska 200 (D. Alaska 1905).

made no exception as to natives.⁸¹ The Indians of Alaska have not only exercised their voting privileges but have held many high elective offices. Of the sixty members of the first state legislature, nine were natives. The president of the Senate, Senator William Beltz, was an Eskimo. Senator Frank Peratrovich, of Tlingit ancestry, elected at large from the Southeastern District, which includes all of appellant communities, succeeded Senator Beltz as President of the Senate. Senator Peratrovich was a delegate to the Constitutional Convention. Senator Peratrovich's election district is composed of 78.3 per cent whites.⁸² In certain areas of Alaska the final outcome of an election can never be predicted until delayed returns from outlying precincts populated largely by Indians, Eskimos and Aleuts have been received.

6. As contrasted with the finding of the court in *Sandoval*, Congress has not historically exercised a fostering care over the communities of Kake and Angoon, nor over their Tlingit ancestors, nor in fact over any of the Indians of Alaska. They were left to make a natural adjustment with the white man and have done so with astonishing ease and thoroughness. It is believed that anything resembling a communal type organization in appellant communities is recent and exists in form to comply with the loan requirements of the Wheeler-Howard Act.⁸³

⁸¹ The Organic Act of August 24, 1912, ch. 387, § 5, 37 Stat. 513, provided that the qualifications of electors should be the same as those provided in the Act of May 7, 1906, ch. 2083, § 3, 34 Stat. 170, which provided:

"Sec. 3. That all male citizens of the United States twenty-one years of age and over who are actual and bona fide residents of Alaska, and who have been such residents continuously during the entire year immediately preceding the election, and who have been such residents continuously for thirty days next preceding the election in the precinct in which they vote, shall be qualified to vote for the election of a Delegate from Alaska."

⁸² Rogers, *Alaska in Transition* 55 (1960).

⁸³ Pp. 42 and 43 supra. [p. 36a this appendix]

7. The doctrine of *United States v. Kagama* has never been applicable to the Alaskan Indian under United States rule. No Indian tribe, independent nation or power has been recognized in Alaska. Crimes committed by Indians in Alaska have always been punished by the territorial and state courts.⁸⁴ There is not now and never has been an area of Alaska recognized as Indian country with one possible exception.⁸⁵ An oft quoted portion of the *Kagama* opinion states:

"These Indian Tribes are the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."⁸⁶

This is almost, sentence by sentence, the exact reverse of the history of the status of the Indian in Alaska since its purchase in 1867.

8. Since Congress has never maintained any guardianship over Alaska Indians, to argue that its guardianship will terminate when Congress itself so determines, has no meaning.

9. Since Congress has never recognized any Indian tribe, nation or power in Alaska, nor treated the na-

⁸⁴ *United States v. Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alaska 1958).

⁸⁵ See *Petition of McCord*, 17 Alaska 162, 151 F. Supp. 132 (D. Alaska 1957). This case stands alone in this area of Alaska law and has been distinguished in *United States v. Booth*, 17 Alaska 561, 567-68, 161 F. Supp. 269 (D. Alaska 1958).

⁸⁶ 118 U.S. at 383-84, 30 L. ed. at 231.

tives as wards in the usual meaning of that term, the historical factor relied on in *Sandoval* is entirely absent from this case.

The broad policy of the United States in its control of federal-Indian relations, as outlined by the United States in its brief, was first to reserve areas for the use of the Indians, to the complete exclusion of whites and of state law. This policy later provided for modified amalgamation with the white population by the allotment process and permissive application of state law to a limited degree, subject always to federal controls for the protection of the Indians. But this is not the history of federal-Indian relations in Alaska. The application of such a policy has never been necessary. Amalgamation has occurred peacefully and naturally. Adaptation to the white man's civilization has been willing and quick and in direct contrast to that made by many tribes in other parts of the United States. We do not mean to imply that the United States has not assisted in the process, for it has. In the fields of health and education, and economically in many instances, it has rendered and continues to render humane and valuable assistance to the natives of Alaska. What we do say is that most of the facts which created the Indian law authority relied on by appellants are absent from this case.

When Congress passed the Alaska Statehood Act it was well aware of the right of a state to regulate the taking of game within its borders and we believe that it intended that all such jurisdiction then being exercised by the Secretary of the Interior under various acts of Congress be transferred to the State of Alaska as soon as it was prepared to assume this responsibility. Section 6(e) of the Alaska Statehood Act provided that all real and personal property of the United States specifically used for the sole purpose of conservation and protection of the fisheries and wildlife was to be transferred to Alaska. It

further provided that administration and management of the fish and wildlife under existing laws be retained by the federal government only until the Secretary of the Interior had certified to Congress that the Alaska State Legislature had made adequate provisions for the administration, management and conservation of such resources in the broad national interest.⁸⁷ This section, in our view, ~~expressed~~ Congress' intent that all control over the management of the fish and wildlife resources of the state be given to the state, along with the property belonging to and then being used by the United States solely for such management. If there had been an intent that the Secretary of the Interior continue to exercise jurisdiction and control over all Indian fishing in Alaska it would have been expressed in this section.

It is considered significant that the temporary administration by the Secretary was to be according to the

⁸⁷ The pertinent wording of section 6(e) reads as follows:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301, 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries law of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: Provided, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest. . . ." 72 Stat. 340 (1958).

provisions of the Alaska game laws of July 1, 1943⁸⁸ and under the Alaska commercial fisheries laws of June 26, 1906⁸⁹ and June 6, 1924,⁹⁰ the latter being commonly known as the White Act. There is no intimation of an intent that any administration under these laws be carried out after the state had been certified as capable of its own management. The provision is that such management and control be retained by the federal government "under existing laws *until*" [emphasis added] the state legislature had made adequate provisions of its own. Such certification was made by the Secretary of the Interior on April 27, 1959 and Alaska assumed control and management of its fish and wildlife resources on January 1, 1960. At the time there controversies arose, however, the Secretary was administering Alaska's fish and wildlife resources for the interim period provided for in section 6(e).

Section 8(d) of the Alaska Statehood Act⁹¹ provided

⁸⁸ 57 Stat. 30, as amended, 48 U.S.C.A. §§ 192-211 (Supp. 1960).

⁸⁹ 34 Stat. 478, as amended, 48 U.S.C.A. §§ 230-39, 241-42 (Supp. 1960).

⁹⁰ 43 Stat. 464, as amended 48 U.S.C.A. §§ 221-28 (1952).

⁹¹ "(d) Upon admission of the State of Alaska into the Union as herein provided, all of the Territory laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified as changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act." 72 Stat. 344-45 (1958).

that upon admission all territorial laws then in force should remain in force except as modified by the act or the state constitution or legislature; all laws of the United States were to have the same force and effect within the state as elsewhere within the United States. The term "Territorial laws" was defined to include acts of Congress, the validity of which depended solely upon the authority of Congress to provide for the government of Alaska, prior to its admission into the Union. The Alaska game laws and the White Act regulating commercial fisheries in Alaska are considered to be "Territorial laws" as defined in the act. Their validity was based on the power of Congress to govern the Territory of Alaska. Upon the admission of Alaska into the Union, these laws were to continue in full force and effect, except as modified by the Alaska Statehood Act, the Constitution of Alaska or thereafter by its legislature. The Alaska game laws and commercial fisheries acts were enacted by Congress for the broad purpose of conserving the fish and wildlife resources of the territory. The intent of sections 6(e) and 8(d) is that as soon as the state legislature had enacted adequate laws for accomplishing that same purpose, the Secretary would no longer administer the fish and game laws and any acts of Congress not already superceded, would be replaced by state law. It is our belief that upon Alaska's admission on January 3, 1959, the Alaska game laws and acts regulating commercial fisheries, as "Territorial laws", continued in force, but were modified by Ordinance No. 3 of the Alaska constitution, prohibiting the use of fish traps for the taking of salmon for commercial purposes and by Article VIII, section 15, providing that "no exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State". They were further modified by the enactment by the first state legislature of a law making it

unlawful to erect, moor or maintain fish traps⁹² and by a later enactment making it unlawful to operate fish traps and prescribing penalties therefor.⁹³ When the various

⁹² SLA 1959, ch. 17 (February 25, 1959) states:

"Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile driven or hand driven fish traps, on or over any lands or tidelands owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

"Sec. 2. The lease or sale of any such State lands or tidelands shall contain a restrictive covenant in keeping with the intent of this Act.

"Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed six months or by fine not to exceed \$1,000.00 or by both such fine and imprisonment.

"Sec. 4. Ch. 154, SLA 1955 is hereby repealed.

"Sec. 5. This Act shall take effect immediately upon its passage and approval or upon its becoming law without such approval."

⁹³ SLA 1959, ch. 95 (April 17, 1959) provides:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos,

articles of the state law providing for the administration, management and conservation of fish and wildlife became effective,⁹⁴ acts of Congress on the same subject were no longer of any force. During the period between the date of admission and the date of assumption of full control of management by Alaska the Secretary of the Interior acted as a trustee-administrator. While acting in this capacity he only partially enforced the prohibition contained in Ordinance No. 3 when he ordered the closure of all fish traps except those of appellants.⁹⁵ He disregarded the

or Aleuts (hereinafter called Natives) or is held by the United States in trust of said Natives.

"Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

"Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tide-lands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska.

"Sec. 3. Sec. 2 of Chapter 17, SLA 1959, is hereby repealed.

"Sec. 4. Sec. 3 of Chapter 17, SLA 1959, is hereby amended to read as follows:

"Sec. 3. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$5,000 or by both such imprisonment and fine.

"Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year or by a fine not to exceed \$5,000.00, or by both such imprisonment and fine."

⁹⁴ SLA 1959, ch. 94, art. IV, §§ 1, 3.

⁹⁵ See Ketchikan Packing Co. v. Seaton, 267 F.2d 660 (D.C. Cir. 1959), which discusses the Secretary's interim authority.

express provisions of article VIII, section 15 of the Alaska constitution by attempting to authorize a special privilege of fishery in appellants. The before mentioned constitutional provisions were basic state policy and had already been approved by Congress. They and the laws implementing them were not dependent upon the certification of the Secretary under section 6(e) before becoming effective.

Appellants argue that the intent of the Alaska legislature expressed in Session Laws of Alaska, 1959, chapter 95, section 1, was that its acts prohibiting fish traps not be construed so as to violate the provisions of section 4 of the Alaska Statehood Act. From this premise appellants seem to conclude that the legislature enacted chapter 95, solely for the purpose of excepting appellants' traps from the general prohibitions. With this conclusion we disagree. Chapter 95 was enacted for a number of obvious reasons. Chapter 17, enacted earlier in the session, had failed to prohibit the operation of fish traps, and applied only to traps "on or over any lands or tidelands". Chapter 95 made it unlawful to *operate* a fish trap, included traps "on or over any lands, tidelands, submerged lands or waters", and increased the penalties to those provided for in section 12, article III of concurrently enacted chapter 94.

The Secretary's order of March 7, 1959 abolishing all fish traps except those of appellants was in conflict with the provisions of chapter 17 enacted February 25, 1959. Prior to and during these times the Alaska legislature was working on chapter 94, providing for management of fish and game by the state. In order to enact legislation satisfactory to the Secretary and obtain his certification in sufficient time to permit the state to assume management of its fish and game on January 1, 1960, time was of the essence. As section 6(e) read at that time, ninety (90) legislative days had to elapse after the certification and during the same calendar year before the section could become effective on the first day of the succeeding calendar

year.⁹⁶ After March 7th the state and the Secretary were in inconsistent written positions as to whether some fish traps were to be permitted or whether all were to be abolished. On the other hand, the Secretary's certification had to be obtained on or about May 1, 1959 in order that ninety (90) Congressional legislative days could elapse during calendar 1959. The Secretary's certification was obtained on April 27, 1959, ten days after chapters 94 and 95 were approved. Whether section 1 of chapter 95 was worded as it was in order to satisfy the Secretary is not apparent from the legislative history of the bill. It is a matter of record, however, that a representative of the Secretary was present in Juneau after March 13, 1959 for the specific purpose of assisting in drafting suitable fisheries legislation. There is nothing in the legislative history of chapter 95 to substantiate a conclusion that the state intended to recognize appellant's claimed right to operate fish traps. The entire background of the issue is contrary to such a construction. A logical explanation of the wording is that it was inserted to preserve or restore administrative harmony at a critical period with the knowledge that the issue would soon be before the courts for decision. In any event, Ordinance No. 3 of the Alaska constitution prohibited the use of all fish traps for commercial purposes in all coastal waters of the state. Appellants' traps were located in coastal waters and were commercial enterprises. These traps could not constitutionally have been excepted from the provisions of Ordinance No. 3 and there is no basis for assuming that the legislature had such an intent.

The decision of the court below dismissing all of appellants' complaints was based in part on the theory that appellants' traps were moored on tidelands or lands under-

⁹⁶ Section 6(e) was not amended to substitute "calendar" for "legislative" days until June 25, 1959, see Alaska Omnibus Act, § 2(b), 73 Stat. 141 (1959).

lying inland waters, the sovereignty over which passed to the State of Alaska upon its admission, and that the state's right of sovereignty was paramount to any right theretofore created by Congress for Indians.

Since *Martin v. Waddell*⁹⁷ was decided in 1842 it has been recognized that the state, as the sovereign representative of its people, owns the right of fishery in the lands within its boundaries lying beneath navigable waters. Later the right of Massachusetts to regulate fishing in the inland waters of Buzzards Bay, an inlet of the Atlantic Ocean about thirty miles long and five to ten miles in width, was recognized by the Supreme Court in 1890.⁹⁸ *Shively v. Boulby*⁹⁹ gave concise recognition to the doctrine that upon the acquisition of a territory by the United States the title and dominion in tidelands were held by it in trust for states to be ultimately created out of the territory and that new states admitted to the Union have the same rights as the original states in the tide waters and in the lands under them. The policy of the United States has been not to dispose of lands thus held in trust for new states except in unusual circumstances brought on by some international duty or public exigency. Such disposals are not lightly to be inferred, and should not be regarded as intended, unless the intention was definitely declared, or otherwise made very plain. In announcing the above doctrine the Supreme Court of the United States held that a swampy but navigable lake, completely surrounded by a reservation established by treaty for the Chippewa Indians, was not granted to the Indians by the treaty, but held in trust for and later granted to the State of Minnesota on its admission.¹⁰⁰

⁹⁷ 41 U.S. (16 Pet.) 367, 10 L. ed. 997 (1842).

⁹⁸ *Manchester v. Commonwealth*, 139 U.S. 240, 35 L. ed. 159 (1891).

⁹⁹ 152 U.S. 1, 30, 38 L. ed. 331, 342 (1894).

¹⁰⁰ *United States v. Holt State Bank*, 270 U.S. 49, 55, 70 L. ed. 465, 468-69 (1926).

The Supreme Court of the United States has consistently held that to deny to new states admitted to the Union ownership of the shores of and the soil beneath navigable waters is a denial of admission on an equal footing.¹⁰¹ The appellee argues that since all of appellants' traps are located within the inland waters of Alaska and not upon lands or waters that came to Alaska by reason of the Submerged Lands Act,¹⁰² as made applicable to Alaska by section 6(m) of the Alaska Statehood Act,¹⁰³ the provision of the Sub-

¹⁰¹ Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-29, 11 L. ed. 565, 573 (1845); Shively v. Bowlby, 152 U.S. 1, 26, 38 L. ed. 331, 341 (1894); United States v. Texas, 339 U.S. 707, 716, 94 L. ed. 1221, 1226 (1950).

¹⁰² 67 Stat. 29 (1953), 43 U.S.C.A. §§ 1301-43 (Supp. 1960). Sections 1311(a) and 1313(b) provide:

"§ 1311. Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development and use

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof. . . .

"§ 1313. Exceptions from confirmation and establishment of States' title, power and rights

"There is excepted from the operation of section 1311 of this title—

"(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians. . . ."

¹⁰³ "(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder." 72 Stat. 343 (1958).

merged Lands Act are not applicable to this controversy. Appellee's argument appears to be consistent with the authorities and correct. In deciding *United States v. California*¹⁰⁴ in 1947 the United States Supreme Court did not disturb the inland waters doctrine just discussed in holding that California did not own the ocean bottom of the marginal sea. Likewise in its decrees in *United States v. Louisiana*¹⁰⁵ and *United States v. Texas*¹⁰⁶ the United States Supreme Court carefully excluded the inland waters of those states. In *United States v. Texas*¹⁰⁷ Justice Douglas again reiterated the doctrine that title to lands underlying inland navigable waters passes to the new state as an incident to the transfer to it of its sovereignty. However, the Submerged Lands Act was passed in 1953 and it cannot be overlooked that section 1311(a) specifically provides that in public interest "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters" is vested in the states.¹⁰⁸ Section 2 of the Alaska Statehood Act provided that the State of Alaska should consist of all the territory, together with the territorial waters appurtenant thereto, then included in the Territory of Alaska.¹⁰⁹ Pursuant to the provisions of sec-

¹⁰⁴ 332 U.S. 19, 91 L. ed. 1889 (1947).

¹⁰⁵ 340 U.S. 899, 95 L. ed. 651 (1950).

¹⁰⁶ 340 U.S. 900, 95 L. ed. 652 (1950).

¹⁰⁷ 339 U.S. 707, 716, 94 L. ed. 1221, 1226 (1950); see *United States v. Louisiana*, 363 U.S. 1, 35, 4 L. ed. 2d 1025, 1049 (1960).

¹⁰⁸ Note 102 *supra*.

¹⁰⁹ "Sec. 2. The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." 72 Stat. 339 (1958).

tion 1312 of the Submerged Lands Act¹¹⁰ Alaska extended its seaward boundaries to include the marginal and high seas to the extent permitted and to include submerged lands.¹¹¹

¹¹⁰ 67 Stat. 31, 43 U.S.C.A. § 1312 (Supp. 1960) provides:

"The seaward boundary of each original coastal State is approved and confined as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

¹¹¹ SLA 1959, ch. 89, §§ 1-2 provide:

"Section 1. The jurisdiction of this State shall extend to and over, and be exercisable with respect to, waters offshore from the coasts of this State as follows:

"(1) The marginal sea to its outermost limits as said limits may from time to time be defined or recognized by the United States of America by international treaty or otherwise.

"(2) The high seas to whatever extent jurisdiction therein may be claimed by the United States of America, or to whatever extent may be recognized by the usages and customs of international law or by any agreement, international or otherwise, to which the United States of America or this State may be party.

"(3) All submerged lands, including the subsurface thereof, lying under said aforementioned waters.

"Sec. 2. The ownership of the waters and submerged lands enumerated or described in Section 1 of this act shall be in this State unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or by operation of law."

Geographically and geologically the Alexander Archipelago of Southeastern Alaska has been determined to be a part of a long mountain range commencing with the Talkeetna Mountains in Southcentral Alaska, extending southeasterly to include the Wrangell and St. Elias Mountains. A partial inundation of the southeastern portion of the range resulted in the creation of arms of the sea and inland waterways without actually altering the original coastline facing the open sea. The trial court made Finding of Fact No. 1 based on the affidavit and attached exhibits of the Commissioner of Natural Resources of the State of Alaska.¹¹² This finding establishes to our satis-

¹¹² This finding states:

"The waters of the Alexander Archipelago, State of Alaska, which lie to the landward of a line drawn from Cape Spencer lighthouse at the entrance of Cross Sound, and following generally the sinuosities of the coast, that is, the meander line of mean low water, and bridging headlands and bays as the line is drawn in a general southeasterly direction past Cape Bartholomew, Cape Muzon, and eastward through Cape Chacon and ending at a line drawn from the northernmost extremity of Pt. Mansfield, Sitklan Island, 040° true, to where it intersects the mainland, as more particularly described in 33 C.F.R. 82, 275, are all inland waters and historic bodies of water. Because of historic, social, and geographic considerations, of which this court takes judicial notice, and based also on a consideration of the record in this case, I find:

"That geographically and geologically the Alexander Archipelago is part of a long mountain range which extends from the southern tip of the so-called Panhandle of Alaska's general land mass in a northwesterly direction, and includes the St. Elias Mountains, the Wrangell Mountains, and the Talkeetna Mountains in Southcentral Alaska;

"That the main mass of igneous rocks which intruded the older sediments forms the core of this general land mass. The resulting topography, formed by erosion of the complex fault patterns and contacts between different rock types, and a later partial inundation, is a series of long, narrow arms of the sea, which have encroached upon the general land mass

faction that all of appellants' trap sites were located within the coastline and in inland waters of the state.¹¹³

We conclude that title to the lands underlying the inland navigable waters upon and over which the fish traps assigned to Kake and Angoon are located, passed to the State of Alaska as an incident to the transfer of sovereignty. No unusual circumstance brought on by international duty or public exigency existed upon which it could be inferred that the intent of Congress was otherwise. To withhold sovereignty over its inland waters* from the state in the absence of compelling reasons and without definitely describing in the act of admission the extent of the sovereignty intended to be withheld, would be a violation of the equal footing doctrine.¹¹⁴ No plain definition of any rights intended to be withheld was given in the act of admission. In the only two instances where Congress expressed an intent in the Alaska Statehood Act that sovereignty be withheld from the state, it did so in concise,

without actually altering its original coastline facing the open sea;

"That the general land mass of the Alexander Archipelago retains its mountain-range character with elevations ranging from 2,000 to 6,000 feet, and that the present arms of the sea were at one time river valleys which have been eroded by glacial action, creating the long, narrow fiords which exist today as inland waterways, the only substantial means of surface transportation throughout the Archipelago.

"That the historical economy of the area involved is primarily oriented to a marine way of life in which the inland waters furnish the primary, and in many areas, the only industry. Said waters are in every respect a necessary and intimate part and parcel of the territory of the State of Alaska."

¹¹³ *United States v. Louisiana*, 363 U.S. 1, 79, 4 L. ed. 2d 1025, 1073 (1960) (offshore islands held part of Louisiana coastline).

¹¹⁴ *Shively v. Bowlby*, p. 57 *supra*. [p. 48 this appendix]

descriptive terms.¹¹⁵ Under the broad power claimed to have been reserved to the United States by section 4 of the Alaska Statehood Act, the Secretary of the Interior could at any time remove or restore the state's sovereignty over any of its inland waters or marginal seas, as long as he purported to act in behalf of Indians.

Our conclusion would be no different even though we considered that the state acquired its sovereignty over inland water by reason of the wording of section 1311(a) of the Submerged Lands Act as appellants contend.¹¹⁶ Apparently this section was framed to combine in statutory form the judicially established inland waters doctrine just discussed with the grant to the states by Congress of lands beneath tidal waters seaward three geographical miles from their coastlines.¹¹⁷ The sovereignty thus acquired would be subject to any rights then held by or for Indians under section 1313(b).¹¹⁸ We have already expressed the view that no such rights in fishing rights were held by or for natives and that no rights were defined in the act of admission where an affirmative duty existed to define any intended reservations. Also, it is our belief that the doctrine of *Shively v. Bowlby* would be as applicable under the Submerged Lands Act as in the inland waters doctrine and that no such reservation could be inferred.

Although most of the foregoing opinion applies to Metlakatla as well as to Kake and Angoon, certain additional facts require a separate discussion of Metlakatla's claims.

¹¹⁵ See § 10, providing for national defense withdrawals and reserving jurisdiction therein to the United States to the extent described and § 11, reserving exclusive jurisdiction to the United States in Mount McKinley National Park to the extent described. 72 Stat. 345-48 (1958).

¹¹⁶ Note 102 *supra*.

¹¹⁷ *United States v. Louisiana*, 363 U.S. at 18, 4 L. ed. 2d at 1038-39. See particularly the legislative history of the act, *id.* n. 16.

¹¹⁸ Note 102 *supra*.

The Metlakatlangs were originally a branch of the Tsimshian Indian tribe of British Columbia. Under the guidance of a missionary and apparently with the encouragement of the United States, some 800 of these Indians emigrated from British Columbia to Annette Island in South-eastern Alaska in 1886 and established the community of Metlakatla.¹¹⁹ In 1891 Congress enacted legislation which, "until otherwise provided by law", set aside the body of lands known as the Annette Islands as a reservation for the use of Metlakatlangs and such other Alaskan natives as might care to join them.¹²⁰ Annette Islands was in an area historically occupied by the Tlingit Indians, although it bordered closely on an area historically occupied by Haida Indians.¹²¹

In February of 1915 the Secretary of the Interior ruled that natives of Metlakatla could erect fish traps on the shores of Annette Island. On April 7, 1916 Alaska Pacific Fisheries, a private corporation, commenced the erection of a fish trap on Annette Island in the immediate area of Metlakatla. The seaward end of this trap was within 3000 feet of the shore at mean low tide. The shoreward

¹¹⁹ *Alaska Pac. Fisheries v. United States*, 4 Alaska Fed. 709, 711, 248 U.S. 78, 86, 63 L. ed. 138, 140 (1918).

¹²⁰ "§ 358. Annette Islands reserved for Metlakatla Indians

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in south-eastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlangs who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1101, 48 U.S.C.A. § 358 (1952).

¹²¹ *Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 455, 469 (Ct. Cl. 1959) (map exhibits depicting Tlingit-Haida territory).

end was 200 feet to the seaward of the line of extreme low tide so that the trap was completely to the seaward of the upland reservation.¹²² On April 28, 1916 President Wilson issued a proclamation declaring the waters within 3000 feet of the shore at mean low tide of Annette and adjacent small islands as a reservation for the Metlakatlangs and such other Alaska natives as had or might join them, to be used under general fisheries regulations administered by the Secretary of Commerce. The purpose of the proclamation was stated to be that of supplementing efforts of the Secretary of the Interior to assist the Metlakatlangs to self support by placing a cannery in operation on Annette Island. The contiguous waters were being reserved to supply fish for the cannery. All unauthorized persons were warned by the proclamation not to fish in the waters.¹²³

¹²² *Alaska Pac. Fisheries v. United States*, 240 Fed. 274, 277 (9th Cir. 1917), *aff'd*, 4 Alaska Fed. 709, 248 U.S. 78, 63 L. ed. 138 (1918).

¹²³ Presidential Proclamation No. 1332, 39 Stat. 1777 (1916), provides:

"WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlangs to self-support, has decided to place in operation a cannery on Annette Island; and

"WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery.

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation; also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlangs and such other Alaskan natives as have

On May 2, 1916 the Assistant United States Attorney for Alaska advised Alaska Pacific Fisheries of the proclamation, but that corporation denied the President's authority to issue it. A suit for injunction was filed and granted by the District Court of Alaska. The Ninth Circuit Court of Appeals sustained the authority of the President on usage and the practical necessities of government. The Corporation was found to have no permit from the War Department to erect an obstruction to navigation and as to the United States who owned the land, it was held to be a mere trespasser.¹²⁴ The Supreme Court of the United States affirmed. It noted the temporary nature of the reservation and the importance of the adjacent fishing grounds. It ignored the Presidential proclamation and held that the geographical name "Annette Islands" was intended by Congress to embrace the "intervening and surrounding waters" as well as the upland.¹²⁵ An act of Congress in 1934 which granted citizenship to the Metlakatlans, declared that any reservations theretofore made by Congress or by executive order or proclamation for their benefit should continue in full force, but should continue to be subject to modification, alteration, or repeal by Congress or the President. The act also declared that the granting of citizenship was not to affect their individual or collec-

joined them or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

¹²⁴ Alaska Pac. Fisheries v. United States, *supra* note 122, at 283.

¹²⁵ Alaska Pac. Fisheries v. United States, 4 Alaska Fed. 709, 248 U.S. 78, 63 L. ed. 138 (1918).

tive rights to property nor the right of the United States to supervise the affairs of the colony.¹²⁶

The land reservation was a temporary withdrawal which has been described by the United States Supreme Court as "not in the nature of a private grant, but simply a setting apart 'until otherwise provided by law . . .'"¹²⁷ The extension of the reservation by Presidential proclamation to include waters within three thousand feet of the shoreline was at least as temporary as the land withdrawal and possibly more so.¹²⁸ In granting citizenship to the Metlakatlans in 1934, Congress confirmed the reservations as

¹²⁶Act of May 7, 1934, ch. 221, §§ 1-2, 48 Stat. 667 (now covered by 8 U.S.C.A. § 1401 [1952]) provided:

" . . . [T]he Indians of the Tsimshian Tribe, and those people known as Metlakahtlans, who emigrated from Metlakahtla, British Columbia, Canada, to Annette Island, in the Alexander Archipelago in southeastern Alaska in the year 1887, and there established a colony known as Metlakahtla, Alaska, and any and all other British Columbia Indians who joined them there not later than January 1, 1900, and have since resided continuously therein, having been faithful and loyal to the Constitution, laws and the Government of the United States, are hereby declared to be citizens of the United States."

"Sec. 2. The granting of citizenship to the said Indians shall not in any manner affect the rights, individuals or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alternation, or repeal by the Congress or the President, respectively."

¹²⁷ *Alaska Pac. Fisheries v. United States*, 4 Alaska Fed. 709, 712, 248 U.S. 78, 88, 63 L. ed. 138, 140 (1918).

¹²⁸ *Sioux Tribe v. United States*, 316 U.S. 317, 86 L. ed. 1501 (1942).

they then existed, but specifically provided that they should continue to be subject to modification, alteration, or repeal by Congress or the President.¹²⁹

It appears likely that the land reservation was created to reward the initiative of the Metlakatlangs and give them some legal rights to be in an area to which they as non-citizens and non-residents had no historical rights. The decision of the Secretary of the Interior in 1915 to establish a cannery on the island to assist the Metlakatlangs is in keeping with the original government policy of encouragement. When the supply of fish immediately available to them to supply their cannery appeared to be jeopardized by the act of Alaska Pacific Fisheries, it then appeared necessary to extend the upland reservation to a distance offshore sufficient to prevent any trap fishing other than by Metlakatlangs. Alaska Pacific had located its trap so that the shoreward end was still two hundred feet to the seaward of extreme low tide, therefore no trespass on the upland reservation was being committed. On the other hand, the Metlakatlangs as a group had not yet been admitted to United States citizenship. Alaska Pacific Fisheries, as a corporation of a state of the United States, no doubt had superior rights in the fisheries of the inland waters.¹³⁰ Extension of the boundaries of the reservation, as was done, may well have been the only alternative presented to the government in order to continue and implement its policy of encouragement toward an alien immigrant group. The effect of the extension, whatever reasons may have motivated it, was to create the only exclusive right of fishery ever to exist in Alaskan waters.

The Metlakatlangs have prospered, amalgamated easily with the native and white population and are in all re-

¹²⁹ Act of May 7, 1934, ch. 221 §§ 1-2, 48 Stat. 667 (now covered by 8 U.S.C.A. § 1401 [1952]).

¹³⁰ Act of June 14, 1906, ch. 3299, § 4, 34 Stat. 263.

spects citizen assets to the United States and the State of Alaska. Annette Island accommodates one of the larger airports of Alaska which serves as the air port of entry to nearby Ketchikan, which is not accessible by highway, for all except amphibious flights. The citizens on Annette Island operate the gasoline concessions and service the large planes of the certificated carriers that regularly stop there. They sell power from a hydro-electric plant, and operate a sawmill, boat-building facilities and mercantile and other business establishments. Many are trained mechanics, electricians, carpenters and shipwrights. They individually own numerous and valuable seine boats, which they use for halibut as well as salmon fishing.¹³¹ Schools were furnished by the Territory of Alaska and are now furnished by the state. The residents pay all forms of taxes just as do other Alaska citizens. Prosecution for the commission of crimes is handled in all respects as though there was no reservation.¹³² The State of Alaska appropriated monies for work projects for depressed areas for fiscal 1960-61. Funds were allocated for Metlakatla as well as for other communities temporarily depressed because of poor fishing seasons.

What we have said previously concerning the omission of Congress to define native fishing rights in the Alaska Statehood Act is equally applicable here. The water reservation held by the Metlakatlans was the only fishing privilege held by a native community at the time of enactment of the Alaska Statehood Act. It did not, in our opinion, qualify as a fishing right as that term was used in section 4 of the act, because of its truly temporary nature. If it had been the intent of Congress that the privilege continue after Statehood we believe Congress would have so stated

¹³¹ See *United States v. Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alaska 1958) transcript of testimony.

¹³² *United States v. Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alaska 1958).

because of the affirmative duty imposed by the Alaska constitution to define any such reservations in the act of admission. The issue now is not whether the Metlakatians have a right of possession to the waters surrounding their upland reservation superior to that of a corporate trespasser, but whether sovereignty over its inland waters has by inference been withheld from a state of the Union. The presumption is that it was not. Such a withholding is not lightly to be inferred.¹³³ The continued maintenance of such a right is in direct collision with state constitutional provisions prohibiting fish traps and exclusive rights of fishery. Metlakatla's temporary privilege had nowhere near the status of the hunting right of Race Horse¹³⁴ which was secured by a treaty.

It is our belief that Metlakatla's exclusive fishing reservation resulted from a combination of unusual circumstances and acts disconnected in time, designed to assist them in the early days of their settlement. The water reservation would doubtless never have been created if it had not appeared necessary to protect their right to fish with traps to supply their cannery, at a time when trap fishing was legal and widely employed. The existence of the exclusive water reservation is now used as a reason to justify the continued use of traps, even though such use is illegal everywhere else in the state. None of the facts which seemed to justify the creation of the exclusive right of fishery are now operative. The Metlakatians are now citizens of the United States and of the state of Alaska and have the same right to fish anywhere in the inland waters and marginal sea as other United States citizens. They are as prosperous as the average fishing community of Alaska, if not more so. They are no more entitled to or in

¹³³ United States v. Holt State Bank, 270 U.S. 49, 55, 70 L. ed. 465, 469 (1926); Shively v. Bowlby, 152 U.S. 1, 38 L. ed. 331 (1894).

¹³⁴ P. 35, supra. [p. 30a this appendix]

need of fishing advantages over their fellow citizens than any other fishing community of Alaska and we do not believe that Congress intended that their temporary privilege in the waters surrounding their upland reservation continue after Statehood. Congress has exercised a fostering attitude toward the Metlakatians far beyond that extended to the natives of Alaska. They were encouraged to immigrate, were given a land reservation, and although they were non-citizens, the Secretary of the Interior gave them permission to fish with traps. The President then gave them an exclusive inland water fishery reservation to supply the cannery subsidized by the government. This concern for their welfare was continued after they had attained United States citizenship and to the present. Whether Congress had the power to so subsidize an alien immigrant group, even though they were Indians, seems doubtful. The power of the President to create an exclusive fishery reservation for such a group seems even more doubtful. However, these are questions that need not be decided by this court at this time. For the reasons already stated we are of the opinion that Metlakatla's water reservation did not survive Statehood.

Appellants have pointed out that sizeable balances remain unpaid on government loans which financed the purchase of traps, canneries, boats and related gear. They also argue that the loss of trap fishing privileges will seriously affect their economy. It appears from the record that there is a sufficient number of independent seine boats in Southeastern Alaska to supply appellants' canneries. If not, the vacuum will undoubtedly be filled within a very short time. We are not convinced that the over-all economy of appellant communities will suffer. On the contrary, there is every reason to believe that the economy of the individual fisherman will be improved. Financial adjustments on loan repayments may be necessary. Adjustment has already taken place in the salmon industry generally. Private enterprise has been required to make radical finan-

cial and physical adjustments patterned as nearly as possible to the state's flexible plan for the conservation and rebuilding of the salmon resource.

In adopting Ordinance No. 3 abolishing fish traps the people of Alaska were not unaware that some economic adjustments would be required. The pros and cons of the issue had been considered for many years. All persons engaged in the salmon industry had notice of the obvious trend. The referendum of 1948, the overwhelming adoption of Ordinance No. 3 in 1956 and passage of the Alaska Statehood Act in 1958 clearly indicated the early arrival of the day when the will of the people could be effected. Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation to annihilation of one of the greatest natural food resources known to mankind, to equitable regulation of seasonal harvests for the greatest benefit to the greatest number, while conserving and rebuilding for posterity. The judgments below are affirmed.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS
RESERVE, a Federally Chartered Corporation,**
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
and THE STATE OF ALASKA, Appellees.

On Appeal from the Supreme Court for the State of Alaska

BRIEF FOR APPELLANT

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS
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*Appellant,***

v.

**WILLIAM A. EGAN, Governor of the State of Alaska,
and THE STATE OF ALASKA, *Appellees.***

On Appeal from the Supreme Court for the State of Alaska

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court for the State of Alaska, rendered June 2, 1961, is reported at 362 P. 2d 901. A copy of the opinion is contained in the separate Appendix to the Statement as to Jurisdiction, Nos.

2 & 3 O.T. 1961, filed jointly by the Metlakatla Indian Community, appellant in No. 2, and Organized Village of Kake and Angoon Community Association, appellants in No. 3. (Herein cited as "Opinion.")

The opinion of the transitional District Court for the State of Alaska, R. 59-66, is reported at 174 F. Supp. 500 (1959).

The opinion of this Court rendered in this case during the October Term 1959 is reported at 363 U.S. 555 (1960). The opinion of Mr. Justice Brennan, who, as Circuit Justice, granted appellant a preliminary injunction on July 11, 1959, is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959).

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on June 2, 1961, and a notice of appeal was filed in that Court on July 27, 1961. This Court noted probable jurisdiction on October 23, 1961.

The jurisdiction of this Court rests on 28 U.S.C. § 1257 (1), (2).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether the Alaska anti-fish trap law, 17 SLA 1959 and 95 SLA 1959, as applied to appellant's fishing in an exclusive Federal Reserve, is repugnant to the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358, to Presidential Proclamation No. 1332, 39 Stat. 1777, as ratified by the Act of May 7, 1934, 48 Stat. 667, to Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958) and to regulations of the Secretary of the In-

terior issued thereunder, 25 C.F.R. Part 88, all of which authorize appellant to fish in the Metlakatla Reserve subject only to Federal control, and whether the Alaska Statute, therefore, violates the Supremacy Clause of the United States Constitution.

2. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332 are invalid because they were repealed by implication by the Alaska Statehood Act.

3. Whether the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, if they were not repealed, are unconstitutional in that they are beyond the powers of the Federal Government to enact and proclaim, respectively, and whether this Court erred when it upheld the Act of 1891 and the Presidential Proclamation in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

4. Whether Section 4 of the Alaska Statehood Act, which provides that Indian trust property, including fishing rights, in Alaska, "shall be and remain under the absolute jurisdiction and control of the United States," is unconstitutional in that it violates the Equal Footing Doctrine.

5. Whether Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act, 73 Stat. 141, if construed as reaffirming the Acts of March 3, 1891 and May 7, 1934, and Presidential Proclamation No. 1332, are invalid because they have not received the express consent of the State of Alaska.

STATUTES INVOLVED

The statutes, Presidential Proclamation, and regulations involved are lengthy, and are set forth in Ap-

pendix A of this brief. Included therein are the pertinent portions of:

1. Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358.
2. Presidential Proclamation of April 28, 1916, 39 Stat. 1777.
3. Act of May 7, 1934, 48 Stat. 667.
4. Alaska Statehood Act, Sec. 4, 72 Stat. 339 (1958).
5. Alaska Statehood Act, Sec. 8(b), 72 Stat. 343-344 (1958).
6. Alaska Omnibus Act, Sec. 2(a), 73 Stat. 141 (1959).
7. Constitution of Alaska, Article XII, Section 12.
8. Constitution of Alaska, Article XII, Section 13.
9. Alaska Anti-Fish Trip Act, Chapter 17, Session Laws of Alaska, February 25, 1959, as amended, Chapter 95, Session Laws of Alaska, April 17, 1959.
10. Regulations of the Bureau of Indian Affairs, Department of the Interior, 25 C.F.R. Pt. 88 (1961 Supp.)

STATEMENT

This suit arose out of an attempt by the newly-created State of Alaska to enter a Federally-created exclusive Indian fishery reserve for the purpose of regulating the fishing rights of appellant, Metlakatla Indian Community, an Indian tribe located on the Annette Islands Reserve in Southeastern Alaska.

On March 7, 1959 the United States Department of the Interior issued regulations (see 24 Fed. Reg. 2053) *inter alia* authorizing appellant to operate during the 1959 fishing season four fish traps, located within the

Metlakatla fishery reserve, an area of about 56¹/₂ square miles.¹ These regulations merely reaffirmed a practice which had existed for many years prior to 1959. R. 6.

The State of Alaska denounced the Federal regulations as void and illegal and warned appellant that a state law which had made the operation of fish traps a crime would be applied against them. R. 13, 32-33. Appellant thereupon brought this action in the interim District Court for the State of Alaska to enjoin State officials from enforcing the anti-fish trap law within the waters of its Federally-protected and Federally-regulated reservation. The appellees moved to dismiss the complaint, R. 40, and their motion was granted. R. 69.

Since the Alaska Supreme Court had not as yet been organized when the District Court rendered its judgment, a direct appeal was taken to this Court. R. 79. Upon appellant's application, Mr. Justice Brennan entered a stay which permitted fishing during the 1959 season and thereafter

pending . . . disposition by this Court of said petitions . . . as [appellants] have been authorized by the Secretary of the Interior of the United States pursuant to his Regulations of March 7, 1959, 24 Fed. Reg. 2053, or as [appellants] may from time to time be authorized by him.

After the appeal had been docketed in this Court but before it had been heard, the new Supreme Court

¹ The size of appellant's water reservation was calculated for the appellees by Mr. Miro Mihelich, a civil engineer. His affidavit is appended to appellees' brief before the Supreme Court of Alaska.

for the State of Alaska was created. Out of an abundance of caution, appellant then filed a second appeal from the judgment of the District Court, this time with the Supreme Court of Alaska.

After hearing this case at the October Term 1959, this Court determined that it had jurisdiction, but concluded that it would "refrain at this stage from deciding the merits of this appeal so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision." 363 U.S. at 562. It pointed out that the Alaska Court could hold as a matter of State law that the fish trap statute did not apply to Metlakatla Indian fishing, thus ending the litigation without raising a Federal question. Accordingly, the Court held the appeal from the District Court on its docket, continued the preliminary stay in effect, and directed the parties to seek a determination of the appeal pending in the Alaska Supreme Court.

Appellant thereupon prosecuted its appeal in the State Supreme Court. That Court affirmed the judgment below. It held that the State statute did apply to Indian fishing and that the Federal statutes, proclamation, and regulations on which appellant's claim of right rested were void and of no effect.

While this litigation was pending, on June 2, 1960, the United States Department of the Interior issued new Alaska fishing regulations, 25 Fed. Reg. 4865, replacing those promulgated in 1959. The only significant change in these regulations as far as appellant is concerned, is that, while the earlier regulations applied to one fishing season only, the new regulations are of indefinite duration. 25 C.F.R. § 88.8 (1961 Supp.).

SUMMARY OF ARGUMENT

Appellant contends that the attempt by the State of Alaska to prohibit trap fishing within its reservation is in direct and total conflict with acts of Congress, a proclamation and regulations of the Executive branch and two decisions by this Court.

Federal concern for the Metlakatians—whose ancestors were known as “people of the fish traps”—began in 1887 when this group of Indians settled on the Annette Islands in Alaska at the express invitation of officials of the United States Government. In 1891, Congress approved the action theretofore taken by the Executive branch by making the land and waters of the Annette Islands a statutory Indian reservation. The boundaries of the water reserve were clearly defined by a Presidential Proclamation issued in 1916 and the reservations theretofore made were reaffirmed by Congress in 1934. During this 70-year period, the Metlakatla water reservation has been twice sustained by this Court.

With the financial and technical support of the Bureau of Indian Affairs, the Metlakatla Indian Community has been able to accumulate the capital necessary to construct and maintain several fish traps and a cooperatively-owned cannery. These investments continue to be the economic backbone of the community. Traps permit the more efficient and economical capture of salmon than is the case with mobile gear. The cannery provides much needed employment and, in good years, a profit for investment in community health and welfare projects and public works. Without traps, however, the cannery and thus the economic life of the community would collapse. For this and other reasons

Congress and the Executive branch have not terminated or diluted their role as guardians and protectors of this Indian community. Rather, they have expressly authorized appellant to continue its accustomed methods of fishing.

At the time Alaskan statehood was being considered, Congress was greatly concerned that Indian and native rights, including fishing rights, might be impaired by statehood. Although the law is clear that existing Indian rights could not be abridged by silence or by implication, Congress, out of an abundance of caution, wrote its concern into Section 4 of the Statehood Act by reserving Indian fishing rights to the "exclusive jurisdiction and control of the United States."

Notwithstanding this uninterrupted course of Federal concern for the economic welfare of the appellant, the Alaska Supreme Court has concluded that the Metlakatla fishing reservation has been extinguished. Yet it has not been able to point to any Congressional action on which this conclusion of law can be based. Moreover, nothing contained in the record or in the opinion of the courts below offers any possible justification of a social or economic nature for the State's invasion of Metlakatla's rights. The only grounds for such interference are emotional and political, which can never justify a State's denial of a Federal right. *Cooper v. Aaron*, 358 U.S. 1 (1958).

Even if social or economic arguments had been advanced in support of the exercise of the State's police powers, they would not have been relevant to the legal issues in this case because control of fishing within appellant's reservation has been preempted by the Federal Government. The exercise of State police power

is precluded because (1) the State anti-fish trap law, if applied to appellant, is in irreconcilable conflict with the Act of 1891, the Statehood Act, and the Secretary of the Interior's regulations as authorized by these statutes, (2) a Federal statute authorizing the State of Alaska to exercise criminal jurisdiction on an Indian reservation expressly provides that the State's police power shall not extend to the "control, licensing, or regulation" of Indian fishing rights, and (3) appellant is a Federal instrumentality which would be seriously burdened if not destroyed by the application to it of the State anti-fish trap law.

In deciding in favor of appellees, the Alaska Supreme Court declared the Federal statutes on which Metlakatla relied invalid on non-constitutional grounds and suggested that if the constitutional questions would have to be reached, these statutes would have to be declared unconstitutional. These holdings of the State Court are wholly in error and in direct conflict with decisions of this Court. They appear to rest on a series of misconceptions as to the relative powers of the States and the national Government under our Federal system.

ARGUMENT

I. INTRODUCTION

When this case was before the Court during the October Term 1959, the question at issue was whether the State of Alaska has the power to remove the protective arm which the Federal Government has placed around the economic interests of the Metlakatla Indian Community, more particularly its fishing rights. More concretely, the issue is whether Alaska has the power, under the Constitution, to enforce its anti-fish trap law

in such manner as to destroy Metlakatla's fishing rights, which rights (1) were established and have been repeatedly confirmed by Congress, the President and this Court, (2) have been expressly preserved from State regulation and control by the Act of Congress admitting Alaska into the Union, and (3) have continued in existence to the present day with the consent and encouragement, and under the express regulations of the Secretary of the Interior.

In its first opinion in this case, this Court decided that even though it had jurisdiction, it would give the newly-created Alaska Supreme Court, which had not as yet spoken on the matter, an opportunity to pass on the merits of the case. It did so because (1) if the State Court decided for appellant on State grounds "a constitutional question now appearing on the horizon might disappear," 363 U.S. at 562, and (2) if it decided for appellees it could assist this Court by furnishing enlightenment on "local economic and social considerations pertinent to the scope of the so-called police power", Id. at 561, which might possibly serve as justification for the State legislation.

The Supreme Court of the State of Alaska has now spoken. As it decided in favor of the assertion of State power, the constitutional question is once again before this Court. But the enlightenment which this Court requested has not been offered. The substantive record for this second appeal has not been enlarged. It is identical with the substantive record in the first appeal. Moreover, the State Court's 76-page opinion is almost exclusively devoted to legal discussion. The few, isolated observations on economic conditions contained in the opinion are (a) not founded on any rec-

ord, (b) not pertinent to the exercise of the police powers, (c) in parts misleading and incomplete.

As this case returns to the Supreme Court of the United States, the questions before it two years ago have been substantially broadened by the wide sweep of the decision rendered by the Supreme Court for the State of Alaska. In its opinion, the State Court found three Federal statutes, a Presidential proclamation, and a set of regulations of the Secretary of the Interior invalid and, in its holdings, in effect took issue with contrary holdings by this Court. The implications of the Alaska Court's decision are, in fact, so far-reaching that they challenge not only Metlakatla's fishing rights, but also the Community's possession of its very home, the upland of the Annette Islands.

There is one further element of confusion in the Alaska Supreme Court's opinion to which appellant wishes to draw the Court's attention. The claim of legal rights asserted by appellant Metlakatla is clearly distinct from the claim asserted by appellants Kake and Angoon in the companion case. Nevertheless, throughout this litigation appellees, as well as the Alaska courts, have failed to state with exactitude which arguments and holdings, respectively, apply to each case.² The resulting lack of specificity, intertwined with dark hints of Indian claims extending to all of Alaska's waters, has clearly been detrimental to appellants in both cases. In this brief, we wish to make clear again,

² The Alaska Supreme Court observed at one point:

Although *most* of the foregoing opinion applies to Metlakatla as well as to Kake and Angoon, certain additional facts require a separate discussion of Metlakatla's claims. (Emphasis supplied.) [Opinion, p. 54a.]

that the Metlakatla Indian Community claims the right to fish with traps only within the boundaries of its Federal reservation—in an area of $56\frac{1}{2}$ square miles, less than 1% of the total water mass of Southeastern Alaska³ and an infinitesimal fraction of the total Alaskan water mass.

Appellant wishes to stress the limited character of the right claimed by it because of a most serious misunderstanding contained in the Alaska Supreme Court's opinion. The Court states:

The absolute jurisdiction claimed to be reserved in the United States is the right to regulate and control all fishing by Indians anywhere in Alaska. There are natives in all parts of Alaska. Approximately 42 per cent of the fishing population reported in the 1950 census were natives. If the full scope of the claimed power were eventually exercised by the Secretary of the Interior, only permanent chaos and conflict could result. The magnitude of the power claimed is such that the effect could be to render useless or futile any effort by the state to regulate. [Opinion, p. 27a.]

The fact of the matter is that while Metlakatlans fish in many parts of Alaska, both outside and within their reservation, they have never questioned the power of the State to regulate their fishing once they leave the reservation waters. It is only within the aforementioned $56\frac{1}{2}$ square miles that an exemption from State control has been claimed. That the Court did not recognize this is difficult to understand in view of appellant's repeated explanation of the geographic limits

³ The total water mass of the Southeastern Alaska Panhandle measures 7,500 to 8,000 square miles, more or less. R. 74.

of its claim in the complaint, R. 9-10, 16, as well as in the briefs and during oral argument before the Alaska Supreme Court.

II. FACTUAL BACKGROUND OF THIS DISPUTE

During oral argument at the October Term 1959 hearing in this case Mr. Justice Frankfurter observed that he wished that counsel had put more flesh on the legal bones of this case, so that the Court would have a better understanding of the underlying reasons for this controversy. This thought was also reflected in the suggestion contained in this Court's opinion that if the Alaska Supreme Court decided for the State it could assist this Court by furnishing enlightenment on "local economic and social considerations pertinent to the scope of the so-called police power", 363 U.S. at 561. Such information, it was thought, might serve to justify the action of the Alaska legislature.

1. The Legal Relevance of Socio-economic Data

As already indicated, the record has not been enlarged to supply further evidence on social and economic conditions tending to support the State's position. Consequently, the only evidence before the Court on socio-economic questions is that contained in the affidavits submitted in the trial court by the appellant. R. 21, 32, 37.⁴ But even if the record contained information tending to support the attempted exertion of Alaska's police power within appellant's reservation,

⁴ Appellees submitted ten affidavits. Six attempt to prove that appellant's alleged injury is speculative since the fish formerly caught by traps might be caught by mobile gear. R. 41-42, 51-53. The other four are the affidavits of a police officer, R. 70-71, two geologists, R. 72-74, and one historian, R. 75-76. None of them contain information relevant to the social and economic conditions which might have led the Alaska legislature to outlaw trap fishing.

such information could not be given weight under the circumstances of this case.

From the early days of the Republic this Court has frequently held that a State may exercise its police powers to regulate a field which the Constitution reserves to Congress, providing, (1) Congress has not acted so as to "occupy the field", (2) the State's regulations do not substantially burden or interfere with national interests as reflected in the Constitution itself, and (3) the State can demonstrate a legitimate local interest in such regulation. The most recent reaffirmation of this doctrine is *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). In applying those general principles, it has often been necessary to balance the depth and intensity of the local interest against the degree of interference with the Federal interest. The interstate commerce cases, for example, have required a judgment of whether the State's interest in highway safety is sufficiently acute to outweigh the nation's interest in an uninterrupted flow of commerce. Depending upon the particular facts of the case, the balance has been struck both for and against State regulation. Compare *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1938) with *So. Pacific R.R. v. Arizona*, 325 U.S. 761 (1945), and *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1960). This balancing of State and Federal interests requires, of course, socio-economic information concerning the State's justification for its attempted regulation.

Appellant respectfully submits, however, that the instant case is not of the foregoing type. Congress has acted to occupy the field. In 1891 it provided that the Metlakatla Community may use its reservation "under such rules and regulations, and subject to such

restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1101, 48 U.S.C. § 358. And in granting statehood to Alaska in 1958, Congress most emphatically declared that Indian fishing rights in the new state "shall be and remain under the absolute jurisdiction and control of the United States." Alaska Statehood Act, Sec. 4, 72 Stat. 339 (1958): Moreover, the State's attempted regulation is not a peripheral intrusion or tangential regulation of a matter of Federal interest. The State's efforts to abolish appellant's traps go to the very heart of the Federal concern for the appellant. The record is uncontradicted that if appellant were deprived of traps it would "wither and die". R. 21. This result would be in diametric conflict with the repeated Federal concern for the economic welfare of the appellant. In such circumstances, appellant submits that State law must yield, regardless of the economic or social justifications which might be offered.

This Court has unswervingly held that "[t]he United States may perform its functions without conforming to the police regulations of a state." *Arizona v. California*, 283 U.S. 423, 451 (1931) citing, *inter alia*, *Hunt v. United States*, 278 U.S. 96 (1928). The latter case involved an attempt by the State of Arizona to enforce its game laws within a national forest and game reserve. In order to reduce overgrazing, the Secretary of Agriculture had authorized the killing of large numbers of deer on federal land. Arizona proceeded to arrest three hunters. This Court upheld an injunction against the State's attempted enforcement of its game laws, saying:

[T]he power of the United States to thus protect its lands and property does not admit of doubt

[citations omitted], the game laws or any other statute of the state to the contrary notwithstanding. [278 U.S. at 100.]

In the field of Indian affairs, the power of Congress has long been recognized as "[p]lenary," *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903), and as "paramount and of a most sweeping character." *People ex rel. Ray v. Martin*, 294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), *aff'd* 326 U.S. 496 (1946). The limitation on the power of states to enforce their criminal laws in the Indian country has been recognized in a long line of cases from *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832), to *Williams v. Lee*, 358 U.S. 217 (1959). As this Court said in the latter case:

[W]hen Congress has wished the States to exercise—power [over Indians] it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied. [*Id.* at 221.]

No such grant of jurisdiction has been made in the instant case.

2. Alaska's Antipathy to Fish Traps

While the Court would thus be able to proceed, without further ado, to a consideration of the questions of law in this case, appellant desires to comply with the Court's request for background information. Such information is offered merely to inform the Court of the political dispute out of which the present legal controversy has grown.

At this stage in history, Alaskan opposition to the eleven fish traps which remain of the more than 700 which once were in operation is based on emotion rather than on rational considerations of an economic or social

nature. The opposition is based on views and attitudes which were formed prior to Alaska's accession to Statehood, when fish traps were first and foremost *symbols of the colonial exploitation of Alaska by "Stateside" fishing and canning interests*. This view of the fish trap was most vividly expressed by Governor, now Senator, Ernest Gruening, in his Keynote Address to the Alaska Constitutional Convention, delivered on November 5, 1955:

The people of Alaska have repeatedly and unchangingly manifested their overwhelming opposition to fish traps. It isn't necessary to rehearse all their reasons—the results have amply justified the Alaskans' position. But fish trap beneficiaries, residents of the mother country, want to retain their Alaska traps. So the traps are retained. And it is the power and authority of the federal government which retains them. In a clear-cut issue between the few, profiting, non-colonial Americans and the many, seriously damaged, colonial Alaskans, the state-side interest wins hands down. And it wins because the government, which is also supposed to be *our* government, throws its full weight on their side and against us.⁵ [GRUENING, LET US END AMERICAN COLONIALISM 20 (1955).]

Alaska's resistance to the fish trap, as exemplified by Senator Gruening's remarks, was basically resistance on the part of local fishermen to automation and, more

⁵ Alaska was apparently unique among the organized Territories in having control of its fisheries vested in Washington rather than the territorial legislature. See testimony of Mastin G. White, Solicitor, Department of the Interior, in *Joint Hearings on S. 1446 and H.R. 3859 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce and Subcommittee of the House Committee on Merchant Marine and Fisheries*, 80th Cong., 2d Sess. 11 (1947). See also testimony of W. C. Arnold, Id. at 61-63.

particularly, and especially, to automation under non-resident auspices. Many of Alaska's residents were fishermen, with limited financial resources. Fish traps, which cost from \$10,000 to \$20,000 each year to acquire and install, were beyond their means. Testimony of Warner W. Gardner, Assistant Secretary of the Interior, in *Hearings on S. 1446 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. 7 (1947). As the Court below correctly states: "The cost of construction and operation [of a fish trap] excluded the average Alaska fisherman from its use and in time the operation of fish traps became generally concentrated in the cannery owners and operators". Opinion, p. 7a.

Yet once the investment in a fish trap is made, the cost of operation is minimal. It needs neither the labor nor the fuel which a seine boat requires. "The labor costs of operating a trap are quite small; only two watchmen are needed and by and large with a reasonable salmon run, the salmon trap is substantially cheaper than seine fishing, so far as the price per salmon caught is concerned." Testimony of Assistant Secretary Gardner, *op. cit. supra* at 7.

We are thus faced here with the familiar struggle of man against machine. What accentuated the struggle was that man was the voteless, frustrated, and often very poor Alaska resident, while most of the machines were owned by large corporate interests controlled by non-residents. As aggressive, insufficiently regulated fishing *by all types of gear* depleted Alaska's

fish resources,⁶ the residents, fishermen and non-fishermen, became increasingly bitter against the industry which, in their view, exploited the Territory's economic resource for the benefit of non-residents, while making no contribution whatever to the local economy. Even the seasonal labor to operate the fish traps and the company-owned canneries was imported on a short-term basis from "the States". The late Senator Richard L. Neuberger pointed out that in 1946 the canneries paid almost two-thirds of their total wage bill to non-residents. These workers were generally "boated northward from 'the States', and do not receive pay until the boats dock again in Seattle. Thus Alaska does not even get their chewing gum and cigarette business." *Survey Graphic Magazine*, February, 1948, reprinted in *LIBERATE ALASKA FROM THE FISH TRAP* 60 (1948).

To the embittered Alaska fishermen, the large canning company and its favorite gear, the fish trap, became a single concept. As one observer put it, "The fish trap, therefore, is looked upon by most Alaskans as the dipper with which the large absentee owner appeared to skim with relative ease the cream of one of the Region's most valuable resources, and then carried away to the Outside the fullest part of the wealth so garnered." *ROGERS, ALASKA IN TRANSITION* 11 (1960).

⁶ Even in their heyday the fish traps accounted for only one half of the total salmon catch. Tables submitted by Seton H. Thompson, Chief, Branch of Alaska Fisheries of the Department of the Interior in *Hearings on H.R. 1515 before the Subcommittee on Alaskan Problems of the House Committee on Merchant Marine and Fisheries*, 81st Cong., 1st Sess. 28 (1949).

Upon Alaska's accession to Statehood, the fish trap, the symbol of colonial exploitation, was abolished. Most of the more than 400 traps which were still in operation in 1958, were closed down. All that remained were 11 Indian-owned traps which the Secretary of the Interior expressly permitted to operate. Four of these traps belong to Metlakatla.

The closing down of 97% of the fish traps which operated in 1958 has eliminated the trap as a serious economic threat to the Alaska fishermen. In recent years the appellant's traps caught only the following percentage of the total catch:

| Year | Alaska Salmon Pack Total ¹ | Metlakatla Trap Caught Salmon Pack ² | Percent (%) |
|------|---|---|-------------|
| | (Standard 48-pound cases) | | |
| 1955 | 2,457,969 | 5,793 | .23 |
| 1956 | 2,950,354 | 13,845 | .47 |
| 1957 | 2,441,894 | 8,308 | .34 |
| 1958 | 2,984,371 | 25,763 | .80 |
| 1959 | 1,770,795 | 13,332 | .75 |
| 1960 | 2,549,545 | 3,249 | .12 |

What is equally significant is that the anti-colonial argument simply does not and never did apply to Metlakatla. The Community's traps have served as a foundation which has enabled the Community to operate a successful cannery. R. 21, 36. *Both the traps and the cannery are owned by the Metlakatla Indian Community.* No non-resident's interest is here involved. (In fact, the Metlakatlans, whose forebears

¹ Pacific Fisherman Yearbook, p. 94 (Jan. 25, 1959), and information obtained from United States Fish and Wildlife Service.

² R. 33 and information obtained from United States Fish and Wildlife Service.

have been known as "People-of-the-salmon-traps", have been residents of Alaska and users of fish traps longer than many of the fishermen who called for their abolition in the name of anti-colonialism.) The employees at the cannery are Alaskans. The cannery's payroll is disbursed and spent in Alaska. Moreover, the profits of the canning operation, rather than being skimmed off the Alaskan economy as was the case elsewhere, are spent in Alaska on public improvement projects.

There remains one other contention which has occasionally been advanced: that fish traps are harmful from a conservation point of view. The makeweight character of this argument is explained in the following authoritative statement contained in a legislative report by the Department of the Interior:

Various arguments have been urged in favor of eliminating the traps, not all of which have equal validity. For example, it is sometimes argued that the traps should be abolished as a conservation measure. Years of experience give no support to this argument. The basic conservation problem is one of permitting escapement of sufficient salmon to maintain the runs in succeeding years. That can be done as easily through regulating the traps as through regulating other types of gear.

It is the economic arguments in favor of abolishing the traps which are decisive. Traps are a form of fishing equipment which require capital outlays beyond the capacity of most individual fishermen to finance. Salmon are also caught in Alaska with purse seines, beach seines, gill nets, troll lines, and other types of gear. These are commonly owned by individual fishermen conducting small-scale operations. [Letter of Douglas

McKay, Secretary of the Interior, to Herbert C. Bonner, Chairman, House Committee on Merchant Marine and Fisheries, printed as Appendix B to Brief for Appellant, No. 326, October Term 1959.]

In the view of the United States Fish & Wildlife Service, the sole conservation question is one of adequate escapement of fish to permit spawning and sustained reproduction. The conservation evil is overfishing whether by traps or nets or a combination of the two. The Secretary's regulations, under which appellants now fish, preclude overfishing by the Community. Only four of its eight potential sites are authorized for trap fishing. 25 C.F.R. 88.2(e) (Supp. 1961) In addition the regulations incorporate by reference Alaska's conservation regulations. Appellant's traps can fish only during those periods in which mobile gear can operate in the area surrounding the Metlakatla reservation. 25 C.F.R. 88.2(d) (Supp. 1961)

The economic and social arguments advanced by opponents of fish traps, though not contained in the record, have thus been shown to be wholly inapplicable to the situation now before this Court. By contrast, the record does contain evidence pointing to the significant social and economic benefits derived by the Metlakatla Indian Community from the traps and the cannery which they support. These benefits take the form of (1) employment of members of the Community in the cannery, R. 32, and (2) utilization of the profits of the cannery by the Community for public works and other services of community improvement, R. 21, which provide employment for fishermen in the off-season and help make Metlakatla an attractive, forward-looking Community, R. 32.

To the average individual fisherman, fishing provides seasonal employment at a level of income which makes it difficult to sustain a family year-round. The payroll at the cannery as well as the cannery profit ploughed back through off-season employment have given the Metlakatla Community the economic and social stability which it would never be able to achieve were it to depend on employment and income from fishing alone. In fact, few fishing and canning operations in Alaska are organized as sensibly as the one which the State of Alaska here seeks to destroy for emotional and political reasons.

III. APPELLANT'S FISHING RIGHTS WERE CREATED BY CONGRESS AND HAVE BEEN CONTINUALLY REAFFIRMED BY CONGRESS, THE EXECUTIVE AND THIS COURT DOWN TO THE PRESENT DAY

A. The 1891 Act Created Appellant's Fishing Rights

The four fish traps which appellant and the United States seek to protect against the State's effort to outlaw their operation are located within the exclusive fishery which is part of the Metlakatla Indian Reservation. That Reservation was established for the Metlakatla Community under the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358. The Act provides:

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be pre-

scribed from time to time by the Secretary of the Interior.

When the Metlakatla Reservation was established in 1891, the Territory's sparse population and its limited significance to commercial interests evidently made it unnecessary to define by metes and bounds the limits of the Community's fishing rights. In the early decades of this century, however, West Coast fishing and canning companies became increasingly active in exploiting Alaska's natural bounty and began to interfere with fishing by the Metlakatlans in their own homeland. This caused President Wilson in 1916 to issue a proclamation which defined the Metlakatla fishery reserve in the following terms:

Whereas the Secretary of the Interior, with a view to assisting the Metlakatlans to self-support, has decided to place in operation a cannery on Annette Island; and

Whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

Now, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved

for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned. [39 Stat. 1777.]

The 1916 Proclamation was given statutory recognition in 1934 when Congress declared the Metlakatians to be citizens of the United States. The Act of May 7, 1934, 48 Stat. 667, provides:

(c) The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakahtla Colony. Any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to modification, alteration, or repeal by the Congress or the President, respectively.

**B. Metlakatla's Fishing Rights Have Been Affirmed
By This Court**

Since its creation in 1891, this Court has had two occasions to consider the validity of Metlakatla's exclusive water reservation. In the first case, it affirmed them expressly. On the second occasion it made use of the principle previously established to sustain the exclusive fishery of another Indian community.

Express affirmation of Metlakatla's fishing rights as well as an authoritative analysis of the origins of the Community are to be found in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). That case was a suit brought by the United States on behalf of Metlakatla to exclude a commercial canning company from erecting traps in the waters immediately adjacent to the Annette Islands. Upholding the Government's contention that these waters were exclusively reserved for the use of Metlakatla, this Court said:

The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this, the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation . . . Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland,—in other words, as descriptive of the area comprising the islands. [248 U.S. at 89.]

Throughout this litigation, the State of Alaska has emphasized that the *Alaska Pacific Fisheries* opinion fails to make express mention of the 1916 Presidential proclamation. The court below, too, states that this Court "ignored" the Presidential proclamation. Opinion, p. 57a. Appellee and the State Court have overlooked, however, the last and most decisive words in the *Alaska Pacific Fisheries* opinion which are "Decree

affirmed". The decree in question "ordered that the defendant Alaska Pacific Fisheries vacate the lands and waters mentioned in the proclamation of the President of the United States on April 28, 1916. . . ." (Emphasis supplied.) *Alaska Pacific Fisheries v. United States*, 240 Fed. 274, 275-6 (9th Cir. 1917).⁸

The second case in which this Court has had occasion to consider appellant's fishery reserve is *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). There the Court sustained the validity of another water reserve, namely that established by the Secretary of the Interior for the Karluk Indians of Alaska. One of the Court's principal reasons for concluding "that the Secretary of the Interior was authorized to include the [surrounding] waters in the [Karluk] reservation",⁹ *Id.* at 116, was the principle established in *Alaska Pacific Fisheries v. U. S.*, *supra*, namely, that an exclusive water reservation surrounding a land reservation is essential for the welfare of the Alaska Indian people and must, therefore, be held an integral part of the total reservation. *Id.* at 114.

C. The Alaska Statehood Act Expressly Preserved Appellant's Fishing Rights

Throughout the course of this litigation neither appellees nor the State courts which have considered the matter have pointed to any statute which repealed, amended, or otherwise modified the rights granted under the 1891 Act. At best they have hinted at repeal

⁸ As previously mentioned, Congress ratified the 1916 Presidential proclamation in 1934.

⁹ The Court then went on to decide that while the Karluk reservation was validly established, the criminal sanctions of the White Act could not be used to protect it.

or amendment by implication. Yet it is an established canon of statutory construction that an earlier specific statute is not repealed by implication by a subsequent general statute. *Ex parte Crow Dog*, 109 U.S. 556, 570-71 (1883). Until explicitly repealed or amended, the Act of 1891 must be accorded the force and effect it had upon enactment. Had Congress chosen to terminate appellant's Federally-protected fishing rights at the time Alaska became a State it could undoubtedly have done so. But absent Congressional action, this ~~Court~~ would surely not allow Indian rights to be destroyed. Cf. *Williams v. Lee*, 358 U.S. 217 (1959).

In the instant case, far from having any basis for finding a sub-silentio repeal of the Metlakatlangs' fishing rights, we have an express Congressional reaffirmation of existing Indian fishing rights. Throughout the ten years of legislative activity on the Alaska statehood issue, Congress never deviated from its firm intention to retain absolute jurisdiction over Indian fishing rights and preserve them from State control. This Congressional will was given explicit expression in Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), as amended, 73 Stat. 141 (1959), which provides:

As a compact with the United States said State and its people do agree and declare *that they forever disclaim all right and title . . . to any lands or other property (including fishing rights)*, the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, *shall be and remain*

under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe . . . (Emphasis supplied.)

Congress could hardly have chosen other words to make it plainer that, as a condition of statehood, Alaska and its people must disclaim *all* interest in Indian property, expressly including "fishing rights", and that as a result of this disclaimer "absolute jurisdiction and control" over "such" property (including fishing rights) is to "be and remain in the United States." The clarity of Section 4 should make unnecessary any further examination of the legislative history. *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 277-78 (1929).

An examination of the legislative history of a decade of Alaska statehood bills would, however, merely reinforce what is readily apparent in the language of Section 4: all control over Indian fishing was to "be and remain" solely in the United States. To avoid burdening the brief with a lengthy recital of legislative history, we refer the Court to the Appendix to appellant's brief in No. 326, October Term 1959. It is sufficient for present purposes to point to the statement of the first committee to report out an Alaska Statehood bill to either house of Congress:

The basic intent of paragraph Second, Section 3, insofar as it deals with matters affecting the Indians, Aleuts, and Eskimos, is to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state, and to maintain unimpaired the authority of the Congress over the use and disposition of native property in Alaska. Provisions to this effect are

a customary feature of enabling acts admitting new States to the Union. [H.R. REP. No. 1731, 80th Cong., 2d Sess. 31 (1948).] (Emphasis supplied.)

Congress never deviated from this original "basic intent" to protect Indian property rights "against the possibility of [State] infringement." In fact, it strengthened its initial resolve by adding to Section 4 the parenthetical phrase "(including fishing rights)," to make clear that Indian property rights included fishing rights. The Senate Committee which added that parenthetical phrase stated in its report:

The bill [H.R. 331, 81st Cong.] provides the machinery for accomplishment of [Alaska's admission] by—

...

(5) Providing . . . for transfer to the State of the highly important Alaskan fisheries and wild-life, *except those which* are subject to international agreement or *are included within the reserved native rights*. (S. REP. No. 1929, 81st Cong., 2d Sess. 1-2 (1950) (Emphasis supplied.)

The language and history of Section 4 of the Alaska Statehood Act thus demonstrate a firm Congressional resolve to maintain the *status quo* prior to statehood with respect to Indian fishing rights. Indeed appellees have conceded as much.¹⁰ Having so conceded, they cannot prevail, for they cannot escape the fact that, as far as Metlakatla is concerned, the *status quo* prior to statehood was the Community's unassailable right to

¹⁰ In their brief to this Court in the first hearing of this case, appellees stated: "Clearly, the intent of Congress was to maintain the *status quo*." Brief for Appellees, Nos. 326, 327 October Term 1959, p. 31.

fish in reservation waters, subject only "to such rules and regulations as the Secretary of the Interior shall provide."

**D. Executive Regulations Confirm Appellant's Right
to Fish With Traps**

The Executive branch has long authorized and even encouraged¹¹ appellant to fish in its reservation waters by means of traps. Indeed, it was almost fifty years ago that the Secretary of the Interior first specifically authorized appellant's trap fishing, by ordering on February 11, 1915:

That, until otherwise ordered by the Secretary of the Interior, natives or associations of natives of Metlakatla who have secured the approval of the Council of the Annette Islands reserve be given permits by the Secretary of the Interior to erect salmon traps on the shores of Annette Islands.
R. 6.

From that date forward, the Secretary has continually authorized trap fishing in the waters surrounding the Annette Islands, and appellant has so fished.

The current regulations were issued to implement Section 4 of the Statehood Act, which specifically reserves to the United States "absolute jurisdiction and control" over Indian "property (including fishing rights)." Those regulations state: "Salmon trap fishing is permitted". 25 C.F.R. § 88.2(d). Thus the regulations, though limiting the number of fish traps which appellant can operate, confirm that those traps which are authorized may operate lawfully.

If there were any doubt of the Secretary's authority to promulgate those regulations, it must be dispelled

¹¹ See, e.g., R. 31, 34.

by the familiar rules that "[a]n administrative order is presumptively valid," *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), and that the Secretary's interpretation of his statutory authority is entitled to "considerable weight", *Ketchikan Packing Co. v. Scanton*, 267 F. 2d 660, 663 (D.C. Cir. 1959), especially where it is contemporaneous with the statute under which it is promulgated, see *Mazer v. Stein*, 347 U.S. 201, 213 (1954), *Great Northern R.R. v. United States*, 315 U.S. 262, 275 (1942), and where he played an important role in its drafting, see *Adams v. United States*, 319 U.S. 312, 314-15 (1943).

Here, the Secretary, who played a major role in the drafting of Section 4 of the Statehood Act, promptly in 1958 issued new regulations, 23 Fed. Reg. 8874 (1958), designed to identify the pre-existing fishing rights of Indians in Alaska which the Statehood Act had preserved. Surely no one was better equipped than the Secretary to determine what these pre-existing fishing rights were. Regulations of the Department of the Interior had authorized trap fishing in appellant's reservation without interruption since 1916. The Secretary and his predecessors participated in the drafting and implementation of the 1891 Act, and have long been intimately familiar with all aspects of Alaskan fishing by virtue of their responsibilities under the White Act, 43 Stat. 464-67, 48 U.S.C. §§ 221-228. Thus, any challenge to his determination that Section 4 authorized appellant to continue to fish with traps in reservation waters "is too restrictive in view of the history and habits of Alaskan natives and the course of administration of Indian affairs in that Territory." *Hynes v. Grimes*, *supra*, 337 U.S. at 110-111.

IV. THE SUPREMACY CLAUSE PROHIBITS THE STATE OF ALASKA FROM DESTROYING APPELLANT'S FEDERAL RIGHT TO FISH WITH TRAPS

Appellant has demonstrated that its right to fish was created by and remains today under the protection and control of the United States Government. This being the case, State interference is precluded by the Supremacy Clause of the U. S. Constitution for at least three reasons.

A. State Law Does Not Apply on an Indian Reservation Unless Congress Expressly So Provides

Clearly Congress acted within its Constitutional authority when creating the Metlakatla Reservation and ratifying President Wilson's Proclamation. *Alaska Pacific Fisheries v. United States*, *supra*; *United States v. McGowan*, 302 U.S. 535 (1938).

As pointed out in Part II of this brief, this Court has unswervingly held that Congress can through the exercise of Federal power in the Indian country constitutionally exclude State authority. *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515 (1832); *Williams v. Lee*, 358 U.S. 217 (1959). The proposition was forcefully stated in *The Kansas Indians*, 5 Wall. (72 U.S.) 737 (1866), a landmark case in which this Court held that Kansas could not tax Indian land:

There can be no question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property or other rights, which it would have been competent to make if Kansas had not been admitted into the Union . . . As long as the United States recognizes [the Indians'] national character they are under the

protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws. [*Id.* at 756-57]

B. Alaska's Efforts to Outlaw Trap Fishing Must Fall Under the Familiar Tests of the Doctrine of Preemption

In the instant case it is perfectly clear that any attempt by the State to enforce its anti-fish trap law would produce total and irreconcilable conflict with the rights granted under the 1891 Act and preserved by Section 4 of the Alaska Statehood Act, as these rights are defined in the Secretary's regulations. Indeed the conflict could not be more blatant: one sovereign says appellant may fish with traps; the other says it may not.

To make the case of preemption even clearer, however, a Congressional statute explicitly precludes the application of Alaska criminal jurisdiction to Indian fishing rights. In 1958 Congress tendered to the then Territory of Alaska general criminal jurisdiction over the Indian country on the same terms as it previously had to several states, 72 Stat. 545, 18 U.S.C. § 1162(a); and the State of Alaska has, by the terms of the act, succeeded to this authority. But that act, before and after Alaska's inclusion, most explicitly reserved in the United States control over Indian fishing by stating:

Nothing in this Section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof. 67 Stat. 588, 18 U.S.C. § 1162(b). (Emphasis supplied.)

In view of the irreconcilable conflict between State and Federal law, Alaska's attempt to close down appellant's

traps must fail. *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824). See also *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

**C. Alaska's Efforts to Regulate Appellant's Fishing Rights
Constitute an Illegal Interference With a Federal Instrumentality**

State control of appellant's fishing rights would violate the doctrine that a State law which taxes, burdens or otherwise interferes with the operation of a federal instrumentality is void under the Supremacy Clause. *M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819).

Appellant is a "federal instrumentality" in law, *Alaska v. Annette Island Packing Co.*, 289 Fed. 671 (9th Cir. 1923),¹² as well as in fact. The record shows that the Metlakatla Indian Community:

- (1) Is a Federally-recognized Indian Tribe. R. 36.
- (2) Operates under a Constitution and under a Federal Charter, both approved by the Secretary of the Interior on August 23, 1944. R. 5.
- (3) Has, since 1915, been specifically authorized by the Secretary of the Interior to fish with traps. R. 6, 9.
- (4) Has received loans from the Bureau of Indian Affairs to help develop its fishing and cannery enterprise. R. 31.¹³

¹² That case holds that the Alaska Territorial Legislature could not impose generally applicable occupation and income taxes upon the Annette Island Packing Co. because the company was a Federal instrumentality and "the tax, if permitted, might be destructive of the means adopted by the [Federal] government to carry out its purposes and obligation." 289 Fed. at 673.

The uncontradicted record further shows that enforcement of the State anti-fish trap act would seriously burden, and ultimately destroy, this Federal instrumentality:

- (1) The Community operates its own fish traps and cannery. All of the profits of the cannery are paid over to the Community, and the entire economy of the Metlakatla Community is based on the cannery. R. 10-12, 30-32, 34-35.
- (2) Without the traps the cannery would be unable to obtain enough fish to operate economically. It would thus be forced to shut down entirely and thereby deprive the Community of its major source of income. R. 21.
- (3) If the cannery were shut down the Community would default on its obligations to repay its loans to the Rural Electrification Administration and the Indian Revolving Loan Fund, R. 57, and would become dependent on welfare aid from the Federal Government, and the State of Alaska. R. 32.¹³

¹³ Mr. Justice Brennan, in his opinion granting a temporary restraining order, summarized these facts thus: "The Indian members of this [Metlakatla] reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only means of support for substantially all the inhabitants of the reservation." 4 L. Ed. 2d at 35.

¹⁴ In 1936 Senator Gruening, then Director of the Division of Territories and Island Possessions of the Department of the Interior, observed:

The extension of the economic and social benefits of the Indian reorganization act to Alaska has paved the way for the security of approximately one-half of the present population of the Territory, whose stabilized future is not only an essential act of humanitarianism but also an important item of wholesome advance. [ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR, p. 30 (1936)]

These facts, which must be accepted as true since the instant case is here on appeal from the grant of appellees' motion to dismiss, conclusively show that the anti-fish trap act, as applied to appellant, unconstitutionally burdens an instrument of the Federal Government.

V. THE OPINION OF THE ALASKA SUPREME COURT IS REplete WITH LEGAL ERROR

Appellant has previously had occasion to point out that both appellees and the Alaska courts have treated this case and the companion case of Kake and Angoon in such a way as to blur the differences between the respective claims of right. It is necessary to analyze the Alaska Supreme Court's opinion with great care to determine which of its holdings do or do not apply to Metlakatla. Such an analysis demonstrates that in spite of the Court's assertion that "most" of its discussion on Kake and Angoon applies to Metlakatla as well, Opinion, p. 54a, the basis for its decision against Metlakatla is to be found in the concluding portion of its opinion, Opinion, pp. 55a-62a.

A. The Holdings of the Court Below

Placing the appellant's claim of right against the court's holdings, we find that the court made the following determinations with respect to Metlakatla:

1. *The 1891 Act*: Appellant argued that in the absence of an explicit repeal, the 1891 Act remains valid and in force. The Alaska Supreme Court replied:

[The Metlakatlans] are no more entitled to or in need of fishing advantages over their fellow citizens than any other fishing community of Alaska and we do not believe that Congress intended that their temporary privilege in the waters surrounding their upland reservation continue after Statehood. [Opinion, pp. 61a-62a.]

Indeed, the Alaska Supreme Court went on to cast doubt upon the Act's initial constitutionality:

Whether Congress had the power to so subsidize an alien immigrant group, even though they were Indian, seems doubtful. [Opinion, p. 62a.]

2. *The Presidential Proclamation*: Appellant argued that the 1916 Presidential Proclamation was valid and in force. The Alaska Supreme Court cast doubt upon its constitutionality as well:

The power of the President to create an exclusive fishery reservation for such a group seems even more doubtful. [Opinion, p. 62a.]

3. *Section 4 of the Statehood Act*: Appellant relied upon the Statehood Act as expressly preserving the Metlakatla fishery. The Alaska Supreme Court held Section 4 inapplicable or unconstitutional on four separate grounds:

- (a) Metlakatla held a "fishing privilege" at the time of the enactment of the Statehood Act, which "... did not qualify as a fishing rights as that term is used in Section 4 of the Act, because of its truly temporary nature." [Opinion, p. 60a.]
- (b) Even if appellants had a fishing right, Section 4 of the Statehood Act is of no force or effect.

"If it had been the intent of Congress that [Metlakatla's] privilege continue after Statehood we believe Congress would have so stated because of the affirmative duty imposed by the Alaska constitution to define any such reservation in the act of admission." [Opinion, pp. 60a-61a.]

This is apparently a specific application with respect to Metlakatla, of the Alaska Supreme

Court's general holding that Section 4 of the Statehood Act is totally invalid on the ground that there was no meeting of the minds—and hence “no contract”—between the United States and Alaska on the question of native rights:

“We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of Article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were “held” by or for natives at the time.” [Opinion, p. 25a.]

- (c) Even if Section 4 of the Statehood Act were valid, its amendment by Section 2(b) of the Alaska Omnibus Act was beyond the power of Congress:

“It is our view that [Section 2(a) of the Alaska Omnibus Act] forms no part of the compact between Alaska and the United States. It was not enacted until ten months after the voters of Alaska had ratified the compact, . . .” [Opinion, pp. 20a-21a.]

The Court apparently believed that the amendment was vital to appellant's claim:

“As originally enacted it [the second part of Section 4 of the Statehood Act] applied only to ‘lands or other property’. As amended it purports to include fishing rights. In the portion of Section 4 immediately preceding, fishing rights were parenthetically included. It is only logical to assume that if it had been intended that fishing rights be included in the section following, along with ‘lands or other

property', the same phraseology would have been employed." [Opinion, p. 21a.]

- (d) Even if Section 4, with or without its amendment, did form a compact between the United States and Alaska, it is unconstitutional as it violates the equal footing doctrine.

"To withhold sovereignty over its inland waters from the state in the absence of compelling reasons and without definitely describing in the act of admission the extent of the sovereignty intended to be withheld, would be a violation of the equal footing doctrine." [Opinion, p. 53a.]

4. Appellant predicated its entire argument upon the well documented premise that Indian law applies to its reservation. The Alaska Supreme Court took direct issue with a century of United States history by declaring that general concepts of Federal Indian law have

"never been applicable to the Alaskan Indian under United States rule . . . [because] Congress has never maintained any guardianship over Alaska Indians . . . [and] . . . has never recognized any Indian tribe, nation or power in Alaska, nor treated the natives as wards in the usual meaning of that term . . . [Opinion, pp. 39a-40a.]

It is respectfully submitted that each one of the foregoing holdings constitutes a grave error of law.

B. The 1891 Act is in Force and Constitutional

As we have demonstrated, Metlakatla's water reservation was established under the authority of the 1891 Act and confirmed and reconfirmed by subsequent legislative, executive, and judicial actions—including the Statehood Act itself. Yet, in the eyes of the State

Court, the water reservation "did not survive Statehood."

If that is so, how did it die? On that point the Court does not offer any enlightenment. It would seem that its conclusion is based on the assumption that the 1891 Act, from which the water reservation was derived, was repealed by the Alaska Statehood Act. Since the 1891 Act granted both land and water rights, appellant's land reservation must also have been repealed. Yet the Alaska Supreme Court, and even the appellees, have hesitated to draw this logical conclusion from their argument.

While it is difficult to conceive of repeal of the 1891 Act by implication, it is even more difficult to conceive of its *amendment* by implication. By what mysterious action did Congress take the water portion out of the 1891 Act and leave the land in it? Alternatively, if it is assumed that the 1891 Act was repealed *in toto*, Congress has, by implication—and without notice or hearing—deprived Metlakatla of everything it owns and has owned for seventy years, including the land on which the people of the Community have built their homes.

Merely to state the foregoing propositions is to demonstrate their absurdity. It is a general canon of statutory construction that an earlier specific statute is not repealed by implication by a later general statute. *Ex parte Crow Dog*, 109 U.S. 556, 570-71 (1885). And when dealing with Indian rights this Court has gone further and repeatedly reaffirmed the doctrine that statutes and treaties establishing Indian rights must be liberally construed. This doctrine was restated most recently in *Squire v. Capocman*, 351 U.S. 1, 6-7 (1956):

Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Worcester v. The State of Georgia*, 6 Pet. 515, 582. *Carpenter v. Shaw*, 280 U.S. 363, 367.

The Alaska Supreme Court's holding that the 1891 Act has come to an end¹⁵ was apparently influenced by its feeling that the act might otherwise be unconstitutional. The power of Congress, the Court says, "to so subsidize an alien immigrant group, even though they were Indians, seems doubtful."¹⁵ Opinion, p. 62a. The simple answer to this contention is that the power of Congress to pass the 1891 Act has not seemed doubtful to this Court. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 112-114 (1949). Moreover, the Alaska Supreme Court is apparently unaware that the Indian commerce clause extends the power of Congress to Indian tribes no matter where located. Until the Louisiana Purchase, many Indian tribes were located on

¹⁵ Metlakatlangs are Tsimshian Indians. The aboriginal home of the Tsimshians lies in northern British Columbia but spills over into Alaska to include its southernmost tip. See DEPARTMENT OF EDUCATION, PROVINCE OF BRITISH COLUMBIA, BRITISH COLUMBIA HERITAGE SERIES, Series 1, Volume 6, pp. 9-10. When the ancestors of the present Metlakatlangs were invited to Alaska by the Government of the United States, they "migrated" seventy miles from Metlakatla, B.C.

foreign soil. And until 1924 a great majority of American Indians were non-citizens. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, p. 154.

C. The 1916 Proclamation Is Constitutional

To the Alaska Supreme Court the Constitutional validity of President Wilson's 1916 proclamation "seems even more doubtful." Opinion, p. 62a. As we have heretofore pointed out, the *Alaska Pacific Fisheries* decision affirmed a decree which expressly relied on the President's proclamation. Moreover, the Congressional ratification of the proclamation in 1934 most clearly placed the executive act on a statutory par with the 1891 law.

D. The Statehood Act Is Applicable and Constitutional

1. Appellant's rights are "fishing rights" within the meaning of Section 4.

As its first reason for finding that the appellant's fishing reservation was not preserved by the Statehood Act, the Alaska Supreme Court held that the "[water reservation] did not . . . qualify as a fishing right as that term is used in section 4 because of its truly temporary nature". Opinion, p. 60a.

Of course it is difficult to see how rights held without interruption since 1891 are "truly temporary"! But, in any event, the duration of appellant's water reservation is not relevant to the question of whether it was preserved by Section 4. The 1891 Act set aside the Annette Islands for the use of appellant "until otherwise provided by law", 26 Stat. 1101, 48 U.S.C. § 358. Section 4 of the Statehood Act required Alaska to disclaim "any land or other property (including fishing rights)" held by or for Indians. 72 Stat. 339. The

Statehood Act did not say that Indian property or land rights had to be irrevocably held in perpetuity. If it had, it would have been a nullity, for every Indian reservation and the rights appurtenant thereto, whether created by treaty, statute or executive order is, in a sense, "temporary". In every case, Congress retains the ultimate power, whether or not it is expressly reserved, to alter, amend or repeal the rights granted, subject only to the possible application of the due process clause. *Morrison v. Work*, 266 U.S. 481, 485 (1915). *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). It is therefore irrelevant that the 1891 Act expressly provides that the reservation shall exist until "otherwise provided by law." It is no more or less permanent than any other Indian reservation.

2. Section 4 of the Statehood Act creates a valid compact.

As its second reason for concluding that the Metlakatla water reservation "did not survive statehood," the Supreme Court of Alaska held "no compact as to fishing rights was formed between the State of Alaska and the United States." Opinion, p. 25a. The argument is based upon slight differences in language between Article XII, Section 12 of the proposed constitution of Alaska, which the citizens of the Territory ratified in 1956 as a basis for Alaska's admission to the Union, and Section 4 of the Statehood Act. The relevant portions are:

Alaska Constitution, Article
XII, Section 12

The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, *as that right or title is defined in the act of admission.*" (Emphasis supplied.)

Statehood Act, Section 4

As a compact with the United States said state and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to *which may be held* by any Indians, Eskimos, or Aleuts (hereinafter called natives) *or is held by* the United States in trust for said natives; . . ." (Emphasis supplied.)

The Alaska Supreme Court held:

A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the state was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It does not comply with the condition by defining the right or title. [Opinion, p. 18a.]

To this conclusion there are at least three obvious answers. In the first place, Alaska cannot, under the Supremacy Clause, impose conditions by which Congress must abide in enacting a Statehood Act.

Second, Congress did define the "right and title" to lands or other property held by or for Indians as that right and title which "may be held by" or "is held for" Indians. Instead of spelling out what these rights might be, Congress incorporated by reference the existing law, treaties, regulations and other factors relating to Indian fishing rights as they existed at the time of admission. Congress thus elected to preserve the *status*

quo, neither adding to nor detracting from existing Indian rights.

Third, even if the Alaska Supreme Court is correct that a statehood compact can be analogized to an ordinary contract and even if Congress failed to "accept" the offer of the Alaskan people contained in Article XII, Section 12 of the draft Alaska Constitution,¹⁶ Section 4 would still be a valid compact between the United States and Alaska. If Congress did not accept the terms of Alaska's offer, then Section 4 must be considered a "counter offer." This counter offer was accepted by the Alaskan people when, on August 26, 1958, they approved Ordinance 3, which expressly states that:

All provisions of the . . . [Statehood Act] reserving rights or powers to the United States, as well as prescribing the terms and conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people. [See 72 Stat. 343-44]

If any doubt remained, it would be dispelled by Section 8(b) of the Statehood Act. Out of an abundance of caution Congress had provided in Section 8(b) that if the Statehood Act were accepted by referendum of the Alaskan voters the proposed Alaska Constitution, ratified by the voters in 1956, "shall be deemed amended accordingly". 72 Stat. 443.

¹⁶ This "offer" must be construed in the light of Article XII, Section 13 of the Constitution of Alaska:

SECTION 13. All provisions of the act admitting Alaska to the Union, which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

3. The Alaska Omnibus Act has no bearing on appellant's rights.

The third major reason assigned by the Alaska Supreme Court for holding that the Metlakatla "water reservation did not survive Statehood", is that Congress attempted in Section 2(a) of the Alaska Omnibus Act, 73 Stat. 141 (1959), to amend Section 4 of the Statehood Act and that this amendment "forms no part of the compact between Alaska and the United States." Opinion, p. 20a.

The court evidently misunderstood the meaning of this provision of the Alaska Omnibus Act. The purpose and effect of the amendment was to enlarge rather than diminish the rights of the Alaskan people. It was designed to *exclude* from the reservation of jurisdiction contained in the second clause of Section 4 *non-Indian* lands and property "the right or title to which is held by the United States." As the Senate and House reports explain, the amendment was designed to:

[M]ake clear that "the absolute jurisdiction and control of the United States" does not apply generally to land held by the United States in Alaska, but only land and property held by natives or by the United States in trust for natives. [S. REP. No. 311, 86th Cong., 1st Sess. 9 (1959); H. R. REP. No. 369, 86th Cong. 1st Sess. 6 (1959).]

If the Alaska Supreme Court were correct that the amendment is invalid, the result would be that the overwhelming majority of its lands, title to which is in the United States, "shall be and remain under the absolute jurisdiction and control of the United States."

4. Section 4 does not deny Alaska admission to the Union on an equal footing.

In affirming the judgment of the court below, the Alaska Supreme Court expressly affirmed the district court's principal ground of decision: "to deny to new states admitted to the Union ownership of the shores and of the soil beneath navigable waters is a denial of admission on an equal footing." Opinion, p. 49a. Appellant submits that this holding is wholly erroneous.

In essence, the equal footing doctrine provides that if the United States may not constitutionally exercise a certain power in one of the original states it may not exercise that power in a new state, even though the statehood act reserves such power to the United States. Thus in the leading case of *Coyle v. Smith*, 221 U.S. 559 (1911), this Court held that Congress could not, as a condition of Statehood, limit Oklahoma's right to select the site for its state capital.

Appellant does not dispute that Congress cannot, *through the exercise of its power to admit new States*, deprive Alaska of sovereignty over its inland waters. The essential point, however, is that Congress retained control of appellant's reservation through the exercise of its powers over Indian tribes, and *not* through the exercise of its power to enlarge the Union. As this Court carefully explained in *Coyle v. Smith*:

In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; *second, between compacts or affirmative legislation intended to operate in futuro, which are within the scope of the conceded powers of Congress over the subject*; and third, compacts or affirmative legislation which operates

to restrict the powers of any such new state in respect of matters which would otherwise be exclusively within the sphere of state power. [221 U.S. at 568 (Emphasis supplied.)]

Provisions falling into the second class, the Court said, did not deny "equal footing" because they are within the scope of Congressional powers *other than the power to admit new states to the Union*.

These principles, as applied to the facts of this case, demonstrate that Section 4 of the Statehood Act is constitutional. No other conclusion is possible unless the authority of Congress to regulate Indian fishing upon the Metlakatla Reservation were derived solely from its power to admit new States to the Union. But the power of Congress to enact Section 4 is derived from its plenary authority in the field of Indian affairs. As was said by the United States Supreme Court in *Coyle v. Smith*, *supra*:

[S]tipulations . . . in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state. [221 U.S. at 570.]

Similarly, in *United States v. Sandoval*, 231 U.S. 28 (1913), this Court said with regard to a provision of the New Mexico enabling act which declared that the Indian liquor laws would apply to the Pueblo Indians:

Being a legitimate exercise of [the Congressional] power [over Indian affairs], the legislation in question does not encroach upon the police power

of the state, or disturb the principle of equality among the states. [231 U.S. at 49.]

Nor is a disclaimer provision, such as that contained in Section 4 of the Alaska Statehood Act, in any way new to the law. The statehood acts for all states which contained a substantial Indian population and were admitted to the Union since 1889 include similar disclaimers. Typical is the provision in Section 4 of the Act admitting Montana, North Dakota, South Dakota, and Washington, 25 Stat. 676, 677 (1889), which declares

And said [state constitutional] conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of the said States:

...

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.* . . . (Emphasis supplied.)

See also Statehood Acts for Utah, 28 Stat. 107, 108 (1894); Oklahoma, 34 Stat. 267, 270 (1906); New Mexico and Arizona, 36 Stat. 557, 558-59, 569-70 (1910).

The Arizona disclaimer provision was recently referred to by this Court in *Williams v. Lee, supra*, 358 U.S. at 222, n. 10, (1959). Other disclaimer provisions have also been uniformly construed as excluding the authority of the State from the Indian Country

unless and until Congress authorizes State intervention. See, e.g., *Whyte v. District Court*, 346 P. 2d 1012 (Colo. Sup. Ct. en banc, 1959), *cert. denied*, 363 U.S. 829 (1960); *In re Pine's Petition*, 99 N.W. 2d 38 (S. Dak. 1959); *Application of Denetclaw*, 83 Ariz. 299, 320 P. 2d 697 (1958); *State v. Begay*, 63 N.M. 409, 320 P. 2d 1017 (1958).¹⁷

**E. Federal Indian Law Applies to Alaska Indians
Including Appellant**

Throughout this litigation appellees have advanced the argument, perhaps somewhat half-heartedly, that appellants Metlakatla, Kake and Angoon are not Indian tribes and that Congress, therefore, lacked authority to legislate with regard to them or, for that matter, with regard to any Indian tribe in Alaska. This Court, in its October Term 1959 opinion, expressed the view that on this issue, too, "enlightenment drawn on the spot by the Alaska Supreme Court may be material to any ultimate determination of federal questions . . ." 363 U.S. at 562.

Here, again, appellant submits, the Alaska Supreme Court has failed this Court. It has discussed the issue, elaborated on it, but does not appear to have reached a definitive conclusion. It comes closest to a holding on the issue of tribal status when it observes:

What we do say is that most of the facts which created the Indian law authority relied on by appellants are absent from this case. [Opinion, p. 40a.]

¹⁷ The United States District Court for Alaska has recently rendered a decision in which it placed reliance on Section 4 of the Alaska Statehood Act and the Alaska Omnibus Act in direct conflict with the decision of the Alaska Supreme Court in this case. See *United States v. State of Alaska*, 197 F. Supp. 834 (D. Alaska, 1961).

Close scrutiny of the Alaska court's opinion raises a serious question as to whether the foregoing statement was intended to apply to all three appellants or to Kake and Angoon alone. In the discussion leading up to the holding on "Indian law authority", the Court makes *inter alia* the following points:

"... Congress has not historically exercised a fostering care over the communities of Kake and Angoon, . . . , nor in fact over any of the Indians of Alaska. . . . It is believed that anything resembling a communal type organization in appellant communities is recent and exists in form to comply with the loan requirements of the Wheeler-Howard Act. [Opinion, p. 38a.]

... Congress has never maintained any guardianship over Alaska Indians . . . [Opinion, p. 39a.]

... Congress has never recognized an Indian tribe, nation or power in Alaska, nor treated the natives as wards in the usual meaning of that term . . . [Opinion, pp. 39a-40a.]

But at another point in its opinion, the Alaska Supreme Court says the very opposite with regard to Metlakatla:

Congress has exercised a fostering attitude toward the Metlakatlans far beyond that extended to the natives of Alaska. They were encouraged to immigrate, were given a land reservation, and although they were non-citizens, the Secretary of the Interior gave them permission to fish with traps. The President then gave them an exclusive inland water fishery reservation to supply the cannery subsidized by the government. This concern for their welfare was continued after they had attained United States citizenship and to the present. [Opinion, p. 62a]

While the opinion is not clear, it would appear that the State court did not intend its earlier discussion to apply to Metlakatla. However, on the chance that it did, appellant will demonstrate that the court erred once again.

In its consideration of the issue of Indian status, the Alaska Supreme Court went to great pains to distinguish this Court's holding in *United States v. Sandoral*, 231 U.S. 28 (1913). In so doing the Court reveals that it totally misunderstands the *Sandoral* decision. In that case, this Court held that it was for Congress, and Congress alone to decide whether an Indian community is to be recognized and dealt with as such. The question of recognition of an Indian tribe, like recognition of a foreign government, is a political question. "[T]he questions of whether, to what extent, and for what time [Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts." 231 U.S. at 46. To the same effect is *United States v. Holliday*, 3 Wall. (70 U.S.) 407, 419 (1866):

[I]t is the rule of this Court to follow the action of the executive and other political departments of the government, whose more special duty is to determine such affairs. If by them those Indians are recognized as a Tribe, this court must do the same.

...

Neither the Constitution of the state nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislation of

the state the supreme law of the land, instead of the Constitution of the United States, and the laws and treaties made in pursuance thereof.

The Metlakatla Indian Community, the record shows, has for more than seventy years been recognized by the Federal government as an Indian group to which the Federal authorities have a special relationship. This is exemplified by the following actions:

- (1) Congress specifically recognized the Metlakatlans in the 1891 Act and set aside a reservation for them "to be held and used by them in common."
- (2) Local self-government of the Metlakatla Community has been recognized by the Secretary of the Interior since 1915, initially under rules and regulations issued by him. See COHEN, HANDBOOK OF FEDERAL INDIAN LAW, p. 415.
- (3) In 1944 the Secretary of the Interior approved a Constitution and By-Laws for the Metlakatla Indian Community under the provisions of 25 U.S.C. § 476 and issued a Charter under the provisions of 25 U.S.C. § 477. (Official copies of these documents were submitted directly to this Court at the October Term 1959 hearing.)
- (4) Congress has appropriated funds under the "Indian Sanitation Facilities Program", established by 73 Stat. 267 (1959), which have been earmarked explicitly for expenditure on a community water supply project at Metlakatla during the 1962 fiscal year. S. REP. No. 294, 87th Cong., p. 21.

Thus Congressional recognition of the Metlakatla Indian Community and concern for its welfare ranges from March 3, 1891 to as recent a date as June 2, 1961, the date of publication of Senate Report No. 294 of the 87th Congress. The fact is that special Federal assistance with regard not only to Metlakatla but to all

Alaska's natives continues to be expected by responsible officials, including the greatest champion of Alaska statehood, Senator Ernest Gruening. In urging his colleagues to restore funds to the Interior Department appropriation bill for the current fiscal year so as to enable the Department to buy a steamship which would facilitate Federal assistance to Alaska's natives, the Senator declared on June 6 and 7, 1961:

It would be a body blow to the Secretary of the Interior, *in his responsibility for taking care of the Indians and Eskimos of Alaska*, if this item remains deleted. 107 CONG. REC. 8866 (Daily ed.)

I think it is at least as important to take care of our own population as it is to take care of the needy populations in 105 other areas of the world. There is no alternative unless we intend to deprive many of our own people of the essentials of life. This appropriation is not for a luxury; it is not socialistic. Nothing has changed in this respect since Alaska became a State. These American citizens are dependent on the Federal Government for supplies, for education, and health services . . . They are still, in many respects, the wards of the Federal Government, and *the responsibility of the Federal Government still persists*. 107 CONG. REC. 9044 (Daily ed.) (Emphasis supplied).

CONCLUSION

Felix S. Cohen, whom this Court has recognized as "an acknowledged expert in Indian law" *Squire v. Capoean*, 351 U.S. 1, 8-9 (1956), said in his definitive treatise, the HANDBOOK OF FEDERAL INDIAN LAW (p. 404):

The legal position of the individual Alaskan natives has been generally assimilated to that of the Indians in the United States. It is now substantially established that they occupy the same relation to the Federal Government as do the In-

dians residing in the United States; that they, their property, and their affairs are under the protection of the Federal Government; that Congress may enact such legislation as it deems fit for their benefit and protection; and that the laws of the United States with respect to the Indians resident within the boundaries of the United States proper are generally applicable to the Alaskan natives.

Acting on the assumption that it has continuing responsibility for the natives of Alaska, the United States has acted to protect Metlakatla's cannery and with it its community from economic ruin. The issue posed by this case is whether the United States has the power to do so. Appellant has demonstrated that the United States has that power. The judgment of the Supreme Court for the State of Alaska should, therefore, be reversed.

Respectfully submitted,

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Date: November 17, 1961

APPENDIX A**Statutes Involved**

1. Section 15, Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358:

Annette Islands reserved for Metlakahtha Indians.

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtha Indians, and those people known as Metlakahthians, who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

2. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777:

WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahthians to self-support, has decided to place in operation a cannery on Annette Island; and

WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean

low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metiakahlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

3. Sec. 3(c) of the Act of May 7, 1934, 48 Stat. 667:

The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively.

4. Section 4, Alaska Statehood Act, 72 Stat. 339 (1958):

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the

right or title to which is held by the United States or is subject to disposition by the United States, and to **any lands or other property** (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute **jurisdiction and control** of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe. . . .

5. Section 8(b), Alaska Statehood Act, 72 Stat. 343-344 (1958):

At an election designated by proclamation of the Governor of Alaska, . . . there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, by separate ballot on each, the following propositions:

.

"(3) All provisions of the Act of Congress approved July 7, 1958 reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people."

In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly. . . .

6. Sec. 2(a) Alaska Omnibus Act, 73 Stat. 141 (1959):

Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives."

7. Article XII, Section 12, Constitution of the State of Alaska:

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition, and not granted or confirmed to the State or its political subdivisions, by or under the act admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

8. Article XII, Section 13, Constitution of the State of Alaska:

All provisions of the act admitting Alaska to the Union which reserve rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property, are consented to fully by the State and its people.

9. Chapter 95, Session Laws of Alaska, April 17, 1959:

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; . . . nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. . . .

Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year, or by a fine not to exceed \$5,000.00, or by both such imprisonment and fine.

10. Regulations of the Bureau of Indian Affairs, Department of the Interior, *Commercial Indian Fishing in Alaska*, 25 C.F.R. Pt. 88 (1961 Supp.):

§ 88.1 Scope.

The regulations in this part implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights which derive from the Act

of June 6, 1924, as amended, 48 U.S.C. 221 et seq., and the limitations and sanctions necessary to preserve such rights are included herein. The regulations in this part are permissive, but shall not be construed as a limitation upon any native rights not mentioned in this part.

§ 88.2 Restrictions on Indian traps.

(a) *Subject to the limitations of paragraph (c) of this section*, not more than twenty-one salmon fish traps may be, but are not required to be, utilized for the purpose of salmon trap fishing by Indian villages. Such fish trap operations, if the natives elect to engage in them, shall be conducted as heretofore only at sites hereinafter described, and within the fishing districts and fishing sections defined in the 1960 edition of the regulations of the Alaska Board of Fish and Game for Commercial Fishing in Alaska.

...

(d) Metlakatla Indian Community (Annette Island Fishery Reserve): Salmon trap fishing is permitted, but not required, at the following sites within the southeast section of the Clarence Strait District from the opening date set by the State of Alaska for any salmon purse seine fishing in the General Section of the southern district to the closing date set by the State for any salmon purse seine fishing in the southeast section of the Clarence Strait District, or one week following the closing date set by the State for any salmon purse seine fishing in the General Section of the southern district, whichever date is later:

... [description of eight authorized locations omitted] ...

(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, and if the villages elect to operate any fish traps, the villages may operate traps only at the following sites: ... Metlakatla: (2), (3), (4), and (6).

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Supreme Court of the United States

October Term, 1961

MAHONIA HUNTER COMPANY, APPELLANT
V.
HUNTER, A HUNTER COMPANY CORPORATION,
RESPONDENT

WILLIAM A. HUNTER, GOVERNOR OF ALASKA,
PLAINTIFF IN ERROR, ALASKA

CHAS. E. HUNTER, JR., AND HUNTER CO.,
DEFENDANTS IN ERROR, APPELLANTS

WILLIAM A. HUNTER, GOVERNOR OF ALASKA

VS. CHAS. E. HUNTER, JR. AND HUNTER CO.

VS. WILLIAM A. HUNTER, GOVERNOR OF ALASKA

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 2

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND
RESERVE, A FEDERALLY CHARTERED CORPORATION,
APPELLANT**

v.

**WILLIAM A. EGAN, GOVERNOR OF THE STATE OF ALASKA,
AND THE STATE OF ALASKA**

No. 3

**ORGANIZED VILLAGE OF KAKE, AND ANGOON COM-
MUNITY ASSOCIATION, APPELLANTS**

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA

ON APPEAL FROM THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

When these cases were previously before this Court (363 U.S. 555), the views of the Solicitor General, on behalf of the United States, were stated to the Court, and the position of the United States was also presented to the Supreme Court of Alaska when it later

heard the case. The primary interest of the Federal Government arises out of its special and continuing relationship to Indians, including the Indians of Alaska, as well as the particular responsibilities laid upon the Federal Government, with respect to Indians in Alaska, by Section 4 of the Alaska Statehood Act. That is the dominant reason for our participation in this case in support of the appellants. But the Federal Government, as represented by the Department of Justice, also has a subsidiary (but not inconsistent) concern—to present the reasons for our view that appellants' (and comparable) fishing rights are not "vested" or compensable under the Fifth Amendment so that, if those rights are held (contrary to our view) to have been terminated by the Statehood Act or the admission of Alaska as a State (or if they are subsequently ended by Congress or the Executive), there can be no constitutional or statutory claim against the United States for just compensation. We do not believe that this subsidiary position is at all inconsistent with our primary concern to support the Indians against the State of Alaska, or that the Court need pass in this case upon the validity of our subordinate contention, but we think it appropriate to set it forth so that there be no misunderstanding, in this or other litigation, as to our stand if and when the issue of compensability should become relevant.

SUMMARY OF ARGUMENT

The Supreme Court of Alaska has rejected appellants' claim that the Alaska fish trap legislation was not intended, as a matter of State law, to apply to

appellants. There still remain the federal issues mooted before this Court at the 1959 Term, and on those questions the opinion of the court below has not caused any change in the position of the Federal Government in support of appellants. We first restate that position; and then respond to the novel reasons advanced by the Alaska Supreme Court for holding against appellants.

I

Section 4 of the Alaska Statehood Act provides for a disclaimer by the State of all right and title to lands or property, including "fishing rights", held by Indians or other natives (or by the United States in trust for them), and also that these interests are to remain under the "absolute jurisdiction and control" of the Federal Government until disposed of under its authority. Under these provisions, Alaska lacks jurisdiction to require the elimination of the appellants' fish traps because the Federal Government retains all rights of regulation and control.

1. Read against the historical and legislative background, the term "fishing rights"—which was specially added late in the consideration of the bill—in Section 4 is broad enough to cover appellants' fishing interests, whether they be vested and compensable as against the United States (as has been asserted), or merely discretionary with the Federal Government (as we believe). Congress was aware of the prior judicial history in which comparable interests had been characterized as "rights" in the very opinions which held them not to be vested but subject to full

regulation by the United States; Congress was also aware of claims that certain Indian rights in Alaska were vested. In these circumstances, Congress made it plain that it did not desire to disturb the status quo, but that the aim of Section 4 was to preserve the situation as it was—including, we believe, continued federal control over Indian fishing.

If the term "fishing rights" (as well as the term "property") in Section 4 were confined to rights vested as against the United States, the Indian portion of Section 4 would, in our view, lose all meaning and effect. The only two Indian reservations in Alaska—the Metlakatla and Karluk reservations—are clearly not of the vested type; and in our opinion no communal Indian rights in the State fall into that category. The result would be that both Congress and Alaska would have adopted a useless, or almost useless, provision. More than that, the status quo would be gravely disturbed, contrary to the Congressional purpose, by the abolition on statehood of the only two Indian reservations in Alaska.

The nub of it is that the terms "property" and "fishing rights" in Section 4 do not refer to the character of the Indian interest *as against the United States*, but only with respect to third parties. As to the latter, those interests are clearly "property" and "rights"—whatever their status vis-a-vis the Federal Government.

2. At the same time, we note expressly that in our view the Statehood Act did not vest, grant, or recognize any Indian rights as compensable against the United States, and that prior to statehood those rights

were not vested or compensable. Both the terms of Section 4 (particularly the first proviso) and its history show that Congress so understood the position of the Federal Government and wished to leave the matter in status quo.

3. The reservation of federal control over Indian fishing, regardless of vested rights, is not inconsistent with the "equal footing" to which Alaska is entitled. Even after admission of a State, Congress retains power to deal with Indian matters within the State under its powers over Indian commerce and public lands (see *Coyle v. Oklahoma*, 221 U.S. 559, 570, 594; *United States v. Sandoval*, 231 U.S. 28, 38); that authority has long been recognized and exercised. Under these granted powers, Congress could have formally created temporary Indian reservations preserving appellants' fishing rights, but the same grant also authorized the lesser reservation of power to regulate and control.

II.

The novel bases of the decision of the Supreme Court of Alaska are erroneous.

1. Despite the doubts of that court, it is settled that the federal Indian power extends to Alaska and its Indians, both prior to statehood and now. See, *e.g.*, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78; *Hynes v. Grimes Packing Co.*, 337 U.S. 86.

2. The court thought Section 4 of the Statehood Act invalid and inoperative because in the court's view it conflicted with or did not meet the require-

ments of the proposed constitution for Alaska adopted in 1956. The short answer is that, both by its terms and under the admission procedure, Section 4 was controlling and the State constitution was automatically amended on statehood to accord with Section 4.

3. Various other erroneous considerations were taken into account in the opinion below. In particular, the court erred in assuming (a) that appellants are not true Indian communities subject to the aid and protection of the Federal Government, and (b) that fish traps are necessarily destructive of conservation interests.

ARGUMENT

When these cases were here before, the Court envisaged the possibility that the Supreme Court of Alaska might interpret the Alaska fish trap legislation as not affecting these appellants—thus avoiding constitutional and other federal issues (363 U.S. at 561-2). That has not come to pass. The Alaska court has squarely applied the State statutes to the appellants, and has reached and decided significant federal questions. We find nothing in the court's opinion on these issues requiring us to change our position, as presented to the Court at the 1959 Term. In Point I, we re-state our position as previously advanced. In Point II, we consider the new arguments proffered by the Supreme Court of Alaska.

I.

THE STATE OF ALASKA LACKS JURISDICTION TO REQUIRE
THE ELIMINATION OF THE APPELLANT INDIANS' FISH
TRAPS

We fully agree with the basic position of appellants that officials of the State of Alaska are not authorized to prohibit operation of the appellants' 11 fish traps.

A. *Introduction.*

Fishing has always been a matter of predominant importance to the natives of Alaska, as well as to the non-native inhabitants, as this Court has more than once recognized. See *Alaska Pacific Fisheries v. United States*, 248 U.S. 78; *Hynes v. Grimes Packing Co.*, 337 U.S. 86. Prior to the admission of Alaska as a State, commercial fishing in the Territory was regulated, not by the Territorial Government, but by the Federal Government under the White Act of June 6, 1924, 43 Stat. 464. The Secretary of the Interior, charged with administering that Act, did not prohibit fish traps but did regulate their use both by natives and by others. As of the date of admission, the appellants had 11 authorized traps.

Upon Alaska's admission in January 1959, the legal situation changed. Section 6(e) of the Statehood Act (App. A, *infra*, p. 43) provided that "the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws" until the elapse of a specified period "after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the adminis-

tration, management, and conservation of said resources in the broad national interest.” Under this authorization—and implementing the provisions of the Alaska Constitution barring fish traps—the Secretary prohibited, during the year 1959, the use of fish traps (*except for the appellants*) by commercial fishermen in Alaskan waters. See *Ketchikan Packing Co. v. Seaton*, 267 F. 2d 660 (C.A.D.C.). In the early part of 1959, Alaska adopted legislation dealing with its fish and wildlife resources, and the Secretary (on April 27, 1959) made the certification contemplated by the proviso in Section 6(e) of the Statehood Act. On January 1, 1960, under this proviso, the State assumed general regulatory authority over fish and wildlife and the power of the Federal Government under the proviso was no longer effective. The general control of fishing in Alaska passed to the State.

The Secretary continued, however, to assert his authority over the use of fish traps by appellant Indians. In the spring of 1960, he promulgated regulations permitting them to operate 11 fish traps, and this permission has been continued. 25 C.F.R. Part 88; 25 Fed. Reg. 3079, 4864-6; 26 Fed. Reg. 7064. As the prime basis for his action, the Secretary relied on Section 4 of the Statehood Act (App. A, *infra*, pp. 41-42), which is permanent legislation dealing with “any land or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives.” The issues now remaining in this litigation

hinge upon the proper interpretation of this phase of Section 4, and upon its validity.

B. Control over Indian fishing was reserved to the United States under Section 4 of the Alaska Statehood Act.

The full text of Section 4 (before amendment by the Alaska Omnibus Act of 1959) is as follows (App. A, *infra*, pp. 41-42):

SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that [all such lands or other property, belonging to the United States or which may belong to said natives], shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this

Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions or alienation. [Brackets added.]

By the Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, the words we have bracketed in Section 4 were stricken, and there was substituted the words: "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives" (App. A, *infra*, p. 44).¹

In our view, the correct construction of this Section is that the federal right over and power to control Indian lands, fisheries, and other interests were preserved in status quo, just as they had been prior to statehood. There was neither relinquishment of rights and a grant to the State (as it contends), nor

¹ It is plain, we believe, that the addition of "including fishing rights," was merely a correction and clarification of the original intent of Section 4, and not a true change or addition. See also *infra*, p. 21, fn. 6.

was there a recognition or grant of rights to the Indians as against the United States. Preservation of that existing situation unchanged was not, we believe, inconsistent with equal footing or with the Submerged Lands Act. But preservation of the existing situation does mean that the Federal Government continues to have exclusive control over Indian fishing in Alaska.

1. The precise terms of Section 4 (as amended in 1959), as they bear on the Alaska Indians, deserve careful analysis because those terms embody the exact powers retained by the Federal Government in this field. The statute first provides that "as a compact with the United States" the State disclaims all right and title to "*any lands or other property (including fishing rights)*", the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such *lands or other property (including fishing rights)*, the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the *absolute jurisdiction and control of the United States* until disposed of under its authority * * * (emphasis added). But the Section immediately goes on, in its first proviso, to provide explicitly that the Statehood Act shall not in any way affect, for or against the claimants, "any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto". The proviso then emphasizes its purpose to leave all pre-existing claims totally unaffected by the State-

hood Act by declaring that nothing in the Act should be read to authorize, establish, recognize, or confirm the validity or invalidity of any such claim.

Our reading of Section 4, in the light of this first proviso (which was added at the request of the Department of Justice), is (a) that Congress retained in the Federal Government, for the future, "absolute jurisdiction and control" over all Indian fishing, whether or not those "fishing rights" could be considered compensable "property" in the conventional sense, but (b) that Congress did not wish to take any stand whatever with respect to claims against the United States by Alaska Indians that they had compensable property, including compensable fishing rights, of which they could not be deprived without compensation. In other words, where money was involved—*i.e.*, "claims" against the Federal Government—Congress deliberately intended to leave matters in status quo, and made no grant or confirmation to the Indians. Where money was not involved—"absolute jurisdiction and control" over Indian fishing from the viewpoint of regulation—Congress deliberately intended to keep full control in the Federal Government (*i.e.*, under the protection of the Interior Department) over Indian "fishing rights" (rather than to vest control in the State), whether or not those "fishing rights" rose to the dignity of compensable rights or were mere privileges accorded by the Federal Government in its discretion. The "fishing rights" of which Section 4 speaks need not be true vested property rights—and, in our view, were not—but they are fishing privileges, or "rights" in a

broader sense, subject to regulation and control by the Federal Government. By the same token, other Indian "property" or "land", as those terms are used in Section 4, need not be land or property to which the Indians have vested rights against the United States.

2. That appellants' "fishing rights" are covered by Section 4 whatever their character—a reading which is certainly consistent with the face of the language Congress used—seems to us to become plain when one considers the Alaskan Indian background and the legislative history of the Statehood Act.

(a). There is nothing in the bare words "fishing rights" to prevent the fishing rights or privileges enjoyed for years by appellants prior to statehood, even though non-compensable, from being characterized as fishing "rights", and even as "property", under Section 4. Those general terms are not necessarily limited to interests which are vested so that they cannot be destroyed without compensation; rather, ambiguous words such as these take their meaning from the context, as well as the background and purposes of the particular legislation in which they appear. With respect to the Alaskan Indians, their fishing and comparable interests have often been called "rights" by the very opinions which hold them *not* to be vested; see the use of the word "right" or "rights" in the cases discussed *infra*, pp. 14-17.

(b). Congress's pre-statehood treatment of the Alaska Indians shows that by the terms "fishing rights" and Indian "property" in Section 4 it must

have meant the interests of these appellants. No other type of Indian "rights" existed in Alaska, and non-compensable interests like the appellants' were frequently referred to as "rights" in the prior judicial history.

The United States has never, by treaty or agreement, established permanent homes—i.e., created "recognized Indian title"—for any of the Alaskan natives. In two instances—those involved in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, and *Hynes v. Grimes Packing Co.*, 337 U.S. 86—reservations, including adjoining fishing waters, have been set aside for the temporary use of the appellants in No. 2 (the Metlakatla) and for the Native Village of Karluk. In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, this Court held that an alleged taking of "unrecognized" Indian title from Alaskan natives was not compensable under the Fifth Amendment "because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States * * *" (348 U.S. at 285).² This decision further rejected the claim (which had been sustained by the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 159 F. 2d 997) that statutes of 1884 and 1900—providing (in general) that natives in Alaska should not be disturbed in their possession of land actually

² It is of interest that the *Tee-Hit-Ton* opinion describes the government's position in that case as follows (348 U.S. at 277):

The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' *property* interest, if any, is merely that of the *right* to the use of the land at the Government's will; * * *. [Emphasis added.]

occupied by them—were a recognition of a right of permanent occupancy. The Court repeated the distinction, strongly emphasized in the *Hynes* case,⁷ between permissive occupation and a grant of vested rights and held that in the federal statutes “what was intended was merely to retain the *status quo* until further congressional or judicial action was taken” (348 U.S. at 278). The Court went on to say that “[t]his policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 * * *” which authorized the action alleged in the *Tee-Hit-Ton* case to constitute a taking. Subsequently, the Court of Claims dismissed another petition of the Tee-Hit-Tons seeking recovery for the alleged taking of an exclusive right of fishing. *Tee-Hit-Ton Indians v. United States*, 132 C. Cls. 624. After referring to the materials on which the Indians relied to establish a private exclusive right of fishing, the Court of Claims said (pp. 625-626):

According to the present law, such a right could not be acquired, even by a purported grant from the Executive. The Act of June 6, 1924, 43 Stat. 464, “For the Protection of the Fisheries of Alaska,” provides in Section 1 that

⁷ In *Hynes* (337 U.S. at 103), the opinion described the situation as follows:

An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such *rights* may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. [Emphasis added.]

"no exclusive or several right of fishery shall be granted" in Alaskan waters.

And after citing *Shively v. Bowlby*, 152 U.S. 1, and *Sutter v. Heckman*, 1 Alaska 81, the court concluded (pp. 626-627):

If we, as the plaintiff's quoted authority says we must do, indulge every presumption against the supposition that at some time in the remote past a grant was made, though the evidence of it has been lost, this is no case for prescription, since those familiar with the history of the times say it was contrary to the policy of the Government to make such grants.

A year earlier, the Court of Claims had dismissed a petition seeking recovery for the alleged taking of the right of an Alaskan group to take seals. *Aleut Community of St. Paul Island v. The United States*, 127 C. Cl. 328. The court held (pp. 334-335):

Whatever rights the Aleuts had to take seals in the waters off St. Paul Island under Russian dominion, there can be no doubt that upon acquisition of that territory by the United States their right to do so was subject to the paramount power of the United States to regulate and control it. [Emphasis added.]

It then concluded, referring to the various Acts of Congress relating to seal fishing (pp. 335-336):

Under these Acts, the only right plaintiff had to kill seals was the right to kill them for food and clothing and for use in the manufacture of small boats, and for the benefit of the United States. The Government had the right to prohibit altogether plaintiff from engaging in sealing and, hence, had the right to permit it to do

so only on the conditions imposed. When plaintiff killed seals it killed them for the benefit of the United States and with knowledge that the United States would sell the skins and put the proceeds of sale in its own treasury. Seals killed by the natives were Government seals. [Emphasis added.]

Concerning alleged exclusive rights of fishing, the Court, in *Hynes v. Grimes Packing Co.*, 337 U.S. 86, held that the White Act of June 6, 1924, 43 Stat. 464, under which the Secretary of the Interior regulated commercial fishing in Alaska, could not be used to enforce an exclusive right of fishing and that the enforcement provisions of that Act could not be used to implement the Executive Order issued under another statute which created the Karluk Reservation and its fishing rights. However, the Court did approve (fn. 53, p. 123) *Dow v. Ickes*, 123 F. 2d 909 (C.A. D.C.), which sustained the permission given by the Secretary for trap fishing at certain locations.

In summary, our view is that, at the time of passage of the Alaska Statehood Act, the general policy of Congress had not been to create vested rights of fishing in Alaska but had been to permit trap fishing by particular fishermen (including Indians)—i.e., Congress had authorized the award of non-compensable "fishing rights." Permanent rights for Indians, either in lands or in fishing rights, had never been created by treaty, agreement, recognition of "original Indian title," or otherwise. Two temporary reservations, especially of waters adjoining the lands for fishing purposes, had been created for the Metlakatla (appellants in No. 2) and one other group.

And Congress had clearly protected the natives' actual possession pending further Congressional action.*

(b). Our construction of Section 4, as referring to appellants' non-compensable interests when it uses the term "fishing rights," accords with the intent of Congress, as shown by the legislative history of that Section. In Hearings before the Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess., the subject of native rights was considered from many aspects (*e.g.*, pp. 122, 135, 137). The nature of pending cases, including the Court of

*One further factor requires mention. Under a Special Jurisdictional Act of June 19, 1935, 49 Stat. 388, the Tlingit and Haida Indians of Alaska filed suit in the Court of Claims to recover for the alleged taking of Indian title to "south-eastern Alaska, lying east of the one hundred and forty-first meridian." The Court of Claims held (in October 1959) that they were entitled to recover for the taking, or for the failure of the United States to prevent others from taking, rights of these Indians to some 20,000,000 acres of land and adjacent waters in Alaska. *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452. The first action of the United States said by the Court of Claims to be a taking from the Tlingit and Haida Indians was the establishment of the Metlakatla Reservation here involved (*id.*, p. 467). The Court of Claims said that the "most valuable asset lost to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others" (*id.*, p. 468). The case was ordered to be tried on the issue of amount of damages.

We by no means agree with this interlocutory decision on the issue of liability but considered it inappropriate to seek review by this Court since the issue as to amount of damages has not been determined and that determination may well influence the question whether the case is important enough to warrant review by this Court.

Claims *Tlingit* case, mentioned ~~below~~ (fn. 4), was explained (pp. 206 *et seq.*). The then pending *Tee-Hit-Ton* case (*supra*, pp. 14-15) was discussed (p. 210), as were the *Hynes* case and the Ninth Circuit *Miller* case (pp. 211-216), *supra*, pp. 14-15, 17. See also *id.*, pp. 231-235, 260-268, 284, 293, 339.

The House Committee in the 84th Congress (H. Rept. No. 88, 84th Cong., 1st Sess.) said (p. 47): "It is provided that no attempt will be made to deal with the legal merits of the indigneous rights but to leave the matter in status quo for either future legislative action or judicial determination." The House Committee in the 85th Congress, 1st Sess. (H. Rept. No. 624, p. 19) repeated this statement of the purpose of Section 4 and the proviso. The Senate Committee expressed the same thought in more detail, saying (S. Rept. No. 1163, 85th Cong., 1st Sess., p. 15):

* * * The bill in its present form does not and is not intended to change or affect the laws of the United States relating to jurisdiction over Indian or native lands.

The first proviso of section 4 directs that nothing contained in the act shall be construed to affect the existence or validity of any claim against the United States nor be construed as an interpretation of the meaning or application of any Federal law pertaining to such claims. The purpose of the proviso is to leave the legal question as to the existence or validity of any claim against the United States, including native claims, in exact status quo, and to leave the question for subsequent legis-

lation or judicial decision without expressing any opinion or mandate in this act.

The second proviso includes within the compact a stipulation that the State shall not impose taxes on property of the United States or native property except to the extent authorized or to be authorized by Congress, but the restriction on taxation does not apply to property held by individual natives in fee without restrictions on alienation. This proviso expresses existing law as it applies within the States and is not intended to effect any change in such law.

Moreover, Congress did add the phrase "(including fishing rights)," over the objections of the Department of Justice (which feared that the phrase might raise an implication that these Indian fishing "rights" were compensable rights).⁵ As we have suggested, *supra*, pp. 12-13, this added phrase can properly be read, together with the proviso to Section 4, as making sure that the Federal Government would retain control over Indian fishing, and not as endowing these "fishing rights" with the character of compensable property. For it is indisputable from the legislative history summarized above that Congress was fully informed as to the differences of view as to native rights in Alaska and expressed, in every possible way, its intent to preserve the status quo—including federal control over Indian fishing

⁵ See H. Rept. No. 624, 85th Cong., 1st Sess., p. 31; S. Rept. No. 1163, 85th Cong., 1st Sess., at p. 47.

in Alaska. No reason appears why the Act should not be interpreted to give effect to that intent.*

3. It is suggested by the court below and by the State that the admission of Alaska abolished the Metlakatla Reservation or at least that part extending 3,000 feet from land.⁷ If the phrase in Section 4, "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives," is read to mean property to which the Indians have *vested rights* as against the United States, like treaty reservations or recognized Indian title, then it would follow under the State's contention that the Metlakatla and Karluk reservations had been abolished by creation of the State. But such a construction is precluded by the fact that it would simply

*The amendment of Section 4 by the Alaska Omnibus Act was made, in part, to make sure that the provision "all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States" would not be interpreted to apply to lands of the United States in Alaska other than those used by natives. The importance of this limitation is emphasized by the fact that, as of June 30, 1959, the United States owned 99.1 percent of the land in Alaska. (See Inventory Reports of Real Property Owned by the United States Throughout the World (General Services Administration, 1959).) If the new State had no criminal or civil jurisdiction over the vast area, its authority would be very severely limited. See S. Rept. No. 331, 86th Cong., 1st Sess., p. 9; H. Rept. No. 369, 86th Cong., 1st Sess., at p. 6.

⁷The suggestion that the Proclamation reserving the waters became void after statehood for lack of definiteness plainly lacks merit in view of *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 113-114.

read this provision out of the Act—since it would not and could not apply to any property in Alaska (see *supra*, pp. 14–18)—and would also mean that Congress had been performing vain acts in inserting the proviso in Section 4 (*supra*, pp. 9–10) and in revising the language of that Section in the Alaska Omnibus Act of 1959, *supra*, pp. 10, 21, so as to clarify the original intent. That amendment emphasizes the original language of Section 4 that “all such lands * * * shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority.”

The basic argument, premised on the bare word “property,” is that only technical vested property rights, valid as against the United States, are preserved in status quo and that, therefore, the temporary withdrawals in *Hynes v. Grimes Packing Co.*, *supra*, and *Alaska Pacific Fisheries*, *supra*, were automatically canceled upon admission of the State. This is a denial of the whole course of history in dealing with Alaskan Indian lands and waters, as well as the intention of Congress and the people of Alaska in connection with admission of the State to the Union.* Abolition of the only two Indian reservations in Alaska cannot be called preservation of the status quo.

The argument also ignores the fact that “property” has a different meaning when rights as against the United States are concerned and when rights as against others are involved. Thus, in *Tee-Hit-Ton*, *supra*, p. 285 the only holding was that original Indian title “creates no rights against taking or extinction by

* See also *infra*, pp. 31–34, 36–37.

the United States protected by the Fifth Amendment or any other principle of law." The same is true of reservations created by Executive Order. *Sioux Tribe of Indians v. United States*, 316 U.S. 317. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, holding that the Indian occupancy was to be respected until extinguished by the United States, makes the distinction clear between rights as against others and as against the United States. This distinction was again emphasized in *Hynes v. Grimes Packing*.

For these reasons, we contend that Section 4 continues federal control over appellants' fishing even though "fishing rights" are neither vested nor compensable as against the United States. But we also believe that it is unnecessary for the Court in this suit to decide or consider the rights of the Indians vis-à-vis the United States. So far as the State of Alaska is concerned, the result of the litigation must be the same whether the appellants' fishing rights are vested or not. A discussion of rights as between the United States and the natives should be rejected here for the same reason that the argument by the third party was rejected in *Beecher v. Wetherby*, 95 U.S. 517, repeated in *Tee-Hit-Ton*, where, concerning Indian occupancy, the Court said (p. 525):

It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter

open to discussion in a controversy between third parties, neither of whom derives title from the Indians.

4. On the other hand, as indicated above, we feel that we should make it plain that we cannot agree that the Statehood Act vested, granted, or recognized any rights compensable against the United States. Rather, as we have said, we think that the Act referred to those rights of temporary possession, until the United States should act otherwise, which were being exercised, especially by means of appellants' fish traps, at the time of the passage of the Act and the admission of Alaska to the Union.

Nor can we agree with any implications in the phrases, in the proposed Indian fishing regulations published by the Interior Department on April 9, 1960, 25 Fed. Reg. 3079—referring to appellants' "fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq. [the White Act], other Federal statutes, regulations and customs; and which were secured to the Alaska Eskimos, Indians and Aleuts by section 4 of the Alaska Statehood Act", and characterizing the proposed regulations as "declaring existing fishing rights of Indians in Alaska"—insofar as these terms may tend to imply that appellants' fishing "rights" are in any way vested or protected as against action by the Federal Government, or legislatively "recognized" as against the Federal Government, so as to be immune from alteration or abolition without payment of compensation.

* See also 25 Fed. Reg. 4964, and 25 C.F.R. 88.1.

Similarly, we do not believe that Section 4 of the Statehood Act—in retaining “absolute jurisdiction and control” in the United States over Indian property, including fishing rights—made it mandatory for the Secretary of the Interior to continue to grant fish-trap privileges to appellants.” Our position is that under Section 4 of the Statehood Act the Secretary has full discretionary authority, pursuant to the White Act, 44 Stat. 752, 48 U.S.C. 221, to regulate and control Indian fishing in Alaska; he is no more compelled to permit the use of fish-traps in 1962 than he was in 1959 (see *Ketchikan Packing Co. v. Seaton*, 267 F. 2d 660 (C.A.D.C.)), but he has the power to do so if he chooses. The Secretary has full authority to do what he considers proper for the protection of Indian fishing rights,” including enlargements of fishing rights beyond those now enjoyed, subject to his consideration of other pertinent factors, including conservation.

“A press release issued by the Interior Department on April 7, 1960, in connection with the publication of the proposed regulations, seems to assume that the Secretary is *required* to permit these fish-traps, that he has no discretion to decide against their use in 1960 or thereafter, and that only Congress can decide to do away with the use of fish-traps by appellants. As indicated in the text, *supra*, we do not agree with these assumptions and have so informed the Department of the Interior. We may add that, in our view, the Department of Justice has never advised the Interior Department that the Secretary has no alternative but to permit the appellants to operate their traps if they choose to do so, or that only Congress can abolish the use of fish-traps by appellants.

“The views of the Department of the Interior on the rights of the Indians and the duties of the Secretary are set forth in Appendix B, *infra*, pp. 45-49. That Department still adheres to those views.

Conversely, if the Secretary does elect to permit the use of fish-traps by appellants, in 1962 or future years, he will not be acting contrary to the White Act's proviso against the grant of an exclusive right of fishery (see *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 116-123).¹² By virtue of Sections 4 and 6 of the Alaska Statehood Act, the White Act can apply, from 1960 onward, only to Indian fishing in Alaska—control over non-Indian fishing now being lodged wholly in the State—and the Secretary's decision to allow Indians to use fish-traps would not discriminate against any person now subject to the White Act. The separate treatment accorded appellants (as compared to non-Indian fishermen) stems, not from any grant to appellants of an exclusive or special right under the White Act, but simply from the fact that the Act now applies only to Indian fishing. There is no discrimination or special treatment under the White Act as it now exists.

C. The reservation of federal control over Indian fishing, regardless of vested rights, is not inconsistent with "equal footing" or with the Submerged Lands Act.

1. The basic case of *Coyle v. Oklahoma*, 221 U.S. 559, recognized that "equal footing" does not prevent

¹² This proviso read as follows:

Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. * * *

reservation of federal power as to matters which are within the constitutional powers of the Federal Government; the Court made reference (pp. 570, 574) to the power to regulate commerce among the States and with the Indian tribes and also public lands. See also *United States v. Sandoval*, 231 U.S. 28, 38. Since the authority over Indians arises from the commerce clause and the treaty and war-making powers, as well as from the control of disposition of federal property," its exercise is not and cannot be limited simply to reserving lands for Indians. Because of the history of federal-Indian relations, and because of the geographic situation in continental United States, that control was exercised, first, in terms of reserving areas for use by the Indians to the complete exclusion of whites and of state law, and, later, to modified amalgamation with the white population by the allotment process and permissive application of state law to a limited degree, subject always to federal controls for the protection of the Indians. See *Board of Comm'rs v. Seber*, 318 U.S. 705, 716, where the Court summarized the history and stated that, "The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." Cf. *Williams v. Lee*, 358 U.S. 217. The power has not rested on any considerations of the principles of property law or of the existence of rights—legal, equitable or moral—in particular lands.

¹¹ As to the various sources of the "federal power to regulate and protect the Indians and their property against interference even by a state", see *Board of Comm'rs v. Seber*, 318 U.S. 705, 715.

Thus, while the Indians have no such right as against the United States in lands temporarily set aside for their use, such as reservations created by Executive Order, *Sioux Tribe v. United States*, 316 U.S. 317, this Court has never held that this circumstance diminishes the federal power to regulate such Indians or permits application of conflicting state law. Cf. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99.

When dealing with Indians in the northwestern United States where fishing, especially in tidal waters, was of great concern and required protection to promote the welfare of the Indians, the courts have recognized that such compelling circumstances may produce an exception to the results that might otherwise follow from admission of a State to the Union. Although it is often said that tidelands in territories are held in trust for future states and that title thereto vests in the State upon admission, that is not the result when a reservation has been created for Indians prior to statehood. *Moore v. United States*, 157 F. 2d 760 (C.A. 9), so held in concluding that the State of Washington's fishing regulations did not extend to tidelands of the Quillayute Indian Reservation." In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, this Court said (pp. 87-88):

That Congress had power to make the reservation inclusive of the adjacent waters and sub-

¹¹ See, also, *Shively v. Bowlby*, 152 U.S. 1, 48, 57-58; *Taylor v. United States*, 44 F. 2d 531, 533 (C.A. 9); *Montana Power Co. v. Rochester*, 197 F. 2d 189, 191 (C.A. 9); *United States v. Remains*, 255 Fed. 253, 259 (C.A. 9).

merged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. *National Bank v. County of Yankton*, 101 U.S. 129, 133; *Shively v. Bowlby*, 152 U.S. 1, 47-48, 58; *United States v. Winans*, 198 U.S. 371, 383. The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States. See *United States v. Kagama*, 118 U.S. 375, 379, *et seq.*; *United States v. Rickert*, 188 U.S. 432, 437.

It is clear that rights to the fishing sites here concerned could have been specifically reserved by Congress through creation of a temporary Indian reservation, regardless of whether permanent beneficial rights might be later vested in the Indians. See, *e.g.*, Section 4 of the Statehood Act for Montana, North Dakota, South Dakota, and Washington, 25 Stat. 676, 677; Utah Statehood Act, 28 Stat. 107, 108; Oklahoma Statehood Act, 34 Stat. 267, 270; Statehood Act for New Mexico and Arizona, 36 Stat. 557, 558-559, 569-570. It follows, we believe, that the comparable reservation of power to control and regulate Indian fishery may constitutionally be reserved, and that this is what was done with respect to Alaska. The specific reservation in Section 4 of the Alaska Statehood Act is the reason *Ward v. Race Horse*, 163 U.S. 504, is irrelevant here; in that case,

the Statehood Act contained no such specific reservation. See 163 U.S. at 511.

2. What we have said disposes likewise of any contention based on the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. 1311-1315, which specifically excepts from State authority "lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians" (43 U.S.C. 1313 (b)). The Submerged Lands Act is specifically referred to in Section 6(m) of the Alaska Statehood Act, which says that Alaska "shall have the same rights as do existing States thereunder." Certainly, Congress saw no conflict between that Act and the reservation of control over Indian fisheries in Section 4 of the Statehood Act.

II.

THE BASES OF THE DECISION OF THE SUPREME COURT OF ALASKA ARE ERRONEOUS

The opinion of the Supreme Court of Alaska did not undertake to prove that appellants are wrong if one accepts the assumption that the intention of Congress in the Statehood Act is to be given effect. Instead the court considers that the admission of Alaska, regardless of the intent of Congress, necessarily abolished many existing rights, including even the Metlakatla reservation which was sustained by this Court in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78. The reasoning of the opinion is contrary to history, as explained in the opinions of this

Court, as well as to the explicit language of the Statehood Act.

A. Congress had power to reserve federal jurisdiction over Alaska native fishing, and did so in Section 4.

Although, as we have shown in Point I, *supra*, pp. 9 ff, the intent of Congress was to preserve the status quo as to native rights in Alaska, the Alaska Supreme Court has now held, in effect, that Congress had no power to do so. As a consequence, the decision renders totally ineffective this part of Section 4 of the Alaska Statehood Act, especially the reference to "fishing rights." It states (Opinion 25): "We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States * * *." This conclusion errs in two basic particulars.

1. *The federal Indian power extends to Alaska.*—The opinion discusses the history of Alaskan natives at length, compares actions taken in Alaska with those in New Mexico with relation to the Pueblo Indians (Opinion 32-35), asserts that the natives here have never "been treated as wards of the United States" (Opinion 36-38), claims that "Congress has never maintained any guardianship over Alaska Indians" (Opinion 39-40), and concludes that no federal authority over Alaskan natives survived statehood. This discussion confuses fundamental power with its exercise. Different local problems create many differences in the manner in which the federal Indian authority is exercised. And lack of complete exercise

¹⁸ The Appendix to the 1961 Statement as to Jurisdiction, in Nos. 2 and 3, consists of the opinion of the Supreme Court of Alaska.

of a power in every instance does not negate the existence of that power or warrant the imposition of limitations upon it. Thus the fact that, in New York, the State has undertaken many of the functions which are exercised elsewhere by the United States does not detract from the federal authority to take appropriate action for the Indians' protection in that State. *United States v. Forness*, 125 F. 2d 928 (C.A. 2); *United States v. National Gypsum Co.*, 141 F. 2d 859 (C.A. 2). In *National Gypsum*, Judge Augustus Hand said (p. 863):

For many years it has been the understanding of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. § 177, R.S. § 2116.

The New York Indians, together with the Alaskan natives and the Pueblos of New Mexico, presented problems so different that they were treated in separate chapters in Cohen, *Handbook of Federal Indian*

Law (Dept. of Int., 1942, pp. 401-425); and in the revision, *Federal Indian Law* (Dept. of Int., 1958), they are treated in Chapter XI, entitled "Special Groups and Laws." But that does not negate the continuing existence of federal authority.

This Court confirmed the power to create the Metlakatla reservation, including the surrounding water, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, applying the law relating to the public purpose (p. 88) "of safe-guarding and advancing a dependent Indian people dwelling within the United States. See *United States v. Kagama*, 118 U.S. 375, 379, et seq.; *United States v. Rickert*, 188 U.S. 432, 437." The statement in the present case (Opinion 62) that "[w]hether Congress had the power to so subsidize an alien immigrant group, even though they were Indians, seems doubtful" demonstrates that the Alaska court refuses to accept the *Alaska Pacific Fisheries* decision and is now suggesting, more than 40 years later, after heavy investments have been made and much reliance placed on it, that it should be overruled.

Nor is the statement (Opinion 59) that the effect of the Metlakatla statute "was to create the only exclusive right of fishery ever to exist in Alaskan waters" accurate. That was the precise purpose of the order creating the Karluk Indian Reservation which this Court held valid in *Hynes v. Grimes Packing Co.*, 337 U.S. 86, again applying the same principles as control Indian matters in other areas.¹⁸ This Court there

¹⁸ For the decree entered making the fishery exclusive, see *Hynes v. Grimes Packing Co.*, 185 F. 2d 338 (C.A. 9).

spoke (pp. 110-111) of "the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory" and proceeded to summarize some of that history, including the *Alaska Pacific case* (p. 114): "The conditions as to the waters around the Annette Islands closely parallel those of other Alaska areas actually occupied by natives." In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, this Court again applied to Alaska natives the same principles applicable to Indians in other areas, when the argument was advanced that a different rule should apply to Alaskan natives. The Court of Claims and the Court of Appeals for the Ninth Circuit have also assumed that the federal Indian power extends to Alaska (*supra*, pp. 14-18).

Since the existence of the federal Indian power in Alaska and its exercise in ways appropriate to the situation and the needs of the natives of Alaska is so clearly established by this Court, it seems unnecessary to document further this error of the Supreme Court of Alaska.¹⁷

2. *The proposed Constitution for the State of Alaska did not limit the power of Congress to reserve jurisdiction in Section 4 of the Statehood Act.*—The plain

¹⁷ A closely related error of the Alaska Supreme Court is its claim (Opinion 24) that Congress has made no distinction in the past between Alaskan natives and whites. This is clearly refuted by the history we have outlined *supra*, pp. 14-18, as well as by the fact that Section 4 of the Statehood Act plainly rests on the assumption that distinctions between natives and others have been made in the past. If there were no such distinction, the terms of Section 4 would be meaningless. See *supra*, pp. 10 ff.

purpose of Congress, as expressed in Section 4 of the Statehood Act, has been frustrated by the following course of reasoning: (a) The Constitution resulting from the convention authorized by the Territorial Legislature in 1956 provided in Section 12 that the proposed State of Alaska disclaimed title to property including fishing rights which may be held by or for any Indian, etc., "as that right or title is defined in the act of admission" (Opinion 16); (b) that this Constitution "can be considered an offer" to which Section 4 of the Statehood Act was the response, thereby forming "a compact between sovereigns" (Opinions 16-17); (c) that (Opinion 18):

A comparison between the offer and response does not indicate definite agreement. The offer to disclaim by the State was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition by defining the right or title;

(d) that no fishing rights, enforceable against the United States, were "held" by or for the natives at the time of statehood (Opinion 24) and (e) (Opinion 25):

We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States by the second sentence of section 12 of article XII of the Alaska constitution and the responsive portion of section 4 of the Alaska Statehood Act. This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were "held" by or for natives at the time.

The court's own recital of the process of admission of Alaska to the Union shows the fallacy of this reasoning. Regardless of the draft Constitution, Congress, after careful study over a period of years (see *supra*, pp. 18-21), stated the terms of admission in the Alaska Statehood Act. This was the "offer" that was made. Not only was ratification by the voters of Alaska required, specifically in proposition 3 (72 Stat. 343-4), to the reservation of rights and powers to the United States in Section 4 of the Act (Opinion 20), but also, in a provision not mentioned in the opinion below, it was provided (72 Stat. 339, 344):

In the event each of the foregoing propositions is adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, *shall be deemed amended accordingly.* * * * [Emphasis added].

Section 4 of the Statehood Act thus controls, and the terms of the 1956 draft of the Alaska Constitution are plainly irrelevant."

This error—the mistaken assumption that the State did not agree to any effective reservation favoring the Indians and did not change its Constitution accordingly—pervades the entire opinion. It is the basis of the refusal to recognize (Opinion 30-31) the

¹¹ Far from supporting the Alaska court's argument, *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 642, 171 P. 2d 838, appeal dismissed, 330 U.S. 803, dealing with the Washington Constitution, restated the basic principle: "the polestar in the construction of Constitutions is the intention of the makers and adopters."

clear distinction of *Ward v. Race Horse*, 163 U.S. 504, *supra*, pp. 29-30, in which the Wyoming Statehood Act contained no reservation comparable to Section 4. Ignoring the amendment of the 1956 Alaska Constitution as a result of the Statehood Act results in the mistaken charge (Opinion 45-46) that the Secretary of the Interior disregarded Article VIII, section 15, of the Alaska Constitution (prohibiting exclusive rights or special privileges of fishery) in permitting appellants to continue to use traps. This same error is the basis of the claimed violation of equal footing (Opinion 53) and of the Submerged Lands Act (Opinion 54)—both of which points assume the non-existence of any effective reservation in the Statehood Act—and it is again asserted, in discussing the Metlakatla situation, where the opinion speaks of “the affirmative duty imposed by the Alaska constitution [on Congress] to define any such reservations in the act of admission” (Opinion 60-61). All of these assertions are, we submit, fallacies resting on the erroneous foundation that the Indian portions of Section 4 never became effective.

B. Other matters mentioned in the opinion do not support the result.

1. The opinion emphasizes the importance of fishing to the economy of Alaska. As this Court has recognized in the *Alaska Pacific* and *Hynes* cases, fishing is of equal, if not greater, importance to the existence and development of the native communities. *Supra*, pp. 7, 14-15.

2. There is no true support for the apparent assertion (Opinion 38) that the appellant communities

were simply formed to secure the financial benefits of the Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461, and that they did not earlier exist in groups or villages. The true history detailed by this Court in the *Alaska Pacific Fisheries* and *Tee-Hit-Ton* cases, *supra*, and by the Court of Claims in the *Tlingit & Haida* case, *supra*, is to the contrary." See *supra*, pp. 14-18. Indeed, the Wheeler-Howard Act controverts the assertion that the Alaskan natives have not been treated as wards of the United States. That Act, entitled the "Indian Reorganization Act," is described in *Federal Indian Law* (Dept. of Int., 1958, pp. 128-129) as one of the three most comprehensive measures dealing with Indian affairs. The same work, at page 938, states that the extension of the Act to Alaska, accomplished by the Act of May 1, 1956, 49 Stat. 1250, "has removed the last significant difference between the position of the American Indian and that of the Alaska native."

3. While recognizing that there have been conflicting views on the question whether the use of fish traps should be outlawed, the Alaska court's discussion would indicate that this was simply a contest between economic interest on the one side and conservation and social interests on the other (Opinion 4-10, 24, 28-29). There was, of course, no evidence taken from expert biologists or others on these factual matters. The fact is that there is substantial basis to support

¹⁰ The Court of Claims in its opinion (177 F. Supp. at pp. 454-456, 461-462) discusses the nature of the Alaskan native villages at some length and its findings, not printed in the Federal Supplement, describe the matter in great detail (Edgs. 23-32).

the conclusion that fish traps, which are fixed in place, can more easily be regulated to promote conservation than can many moving boats. It is inappropriate to engage here in an extended discussion on this subject. However, the Department of the Interior has advised us that the 11 traps operated in the 1961 season produced a catch of some 1,022,449 fish, valued at \$547,785, and that the total catch "is in excess of any year since 1949."²⁰ This seems contradictory to the picture of a constantly dwindling supply of fish caused by traps, as the opinion below would seem to indicate (*e.g.*, 5-6).

4. Finally, it should be emphasized that the Supreme Court of Alaska misunderstands our position when it says that the government claims a reserved right to regulate fishing by individual natives anywhere in Alaska (Opinion 27, 28-29). We do not make any such claim in this case. What this case involves are the fish traps that had been operated by the native *villages or communities* in the past.²¹ The court's refusal to recognize the difference between

²⁰ For comparison purposes, the catch in the last seven years was as follows:

| Year | Number of Traps | Number of Fish | Value |
|-----------|--------------------|-------------------|-----------|
| 1955..... | 8 | 351,373 | \$166,700 |
| 1956..... | 9 | 525,866 | 275,705 |
| 1957..... | 8 | 266,387 | 158,547 |
| 1958..... | 11 | 536,619 | 302,750 |
| 1959..... | 11 | 327,466 | 231,265 |
| 1960..... | 11 | 173,284 | 100,541 |
| 1961..... | 11 | 1,022,449 | 548,184 |

²¹ The legislative history of Section 4 of the Statehood Act is addressed to the village or group activities, not to fishing by individual natives throughout Alaska.

the problems of this case—the communal fishing by the villages in their long accustomed places—and the activities of individual natives throughout the State, appears again in the incorrect comparison between the total catch of the village trap and that of “a gill net or purse seine fisherman” “from the point of view of conservation” (Opinion 29). The true comparison, if relevant at all, would be between the fishing of the entire village, as a community, and the catch of the village’s traps.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

OSCAR H. DAVIS,
Assistant to the Solicitor General.

ROGER P. MARQUIS,
Attorney.

NOVEMBER 1961.

APPENDIX A

The Alaska Statehood Act, 72 Stat. 339, provides in pertinent part as follows:—

Section 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska entitled, "An Act to provide for the holding of a constitutional convention to prepare a constitution for the State of Alaska; to submit the constitution to the people for adoption or rejection; to prepare for the admission of Alaska as a State; to make an appropriation; and setting an effective date", approved March 19, 1955 (Chapter 46, Session Laws of Alaska, 1955), and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

* * * *

Section 4.

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any

lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

* * * * *

Section 6 (c).

* * * *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest: * * *

* * * * *

Section 8 (d).

Upon admission of the State of Alaska into the Union as herein provided, all of the Territorial laws then in force in the Territory of Alaska shall be and continue in full force and effect throughout said State except as modified or changed by this Act, or by the constitution of the State, or as thereafter modified or changed by the legislature of the State. All of the laws of the United States shall have the same force and effect within said State as elsewhere within the United States. As used in this paragraph, the term "Territorial laws" includes (in addition to laws enacted by the Territorial Legislature of Alaska) all laws or parts thereof enacted by the Congress the validity of which is dependent solely upon the authority of the Congress to provide for the government of Alaska prior to the admission of the State of Alaska into the Union, and the term "laws of the United States" includes all laws or parts thereof enacted by the Congress that (1) apply to or within Alaska at the time of the admission of the State of Alaska into the Union, (2) are not "Territorial laws" as defined in this paragraph, and (3) are not in conflict with any other provisions of this Act.

* * * * *

2. The Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, provides in Section 2, under the rubric "Federal Jurisdiction":

(a) Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words "all such lands or other property, belonging to the United States or which may belong to said natives", and inserting in lieu thereof the words "all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives".

(b) Section 6(e) of said Act is amended by striking out the word "legislative", and inserting in lieu thereof the word "calendar".

APPENDIX B

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., May 4, 1960.

By messenger

90-2-0-544

Hon. J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington, D.C.

Dear Mr. Rankin:

We have reviewed the draft of brief which you propose to file *amicus curiae* in the Supreme Court in *Metlakatla Indian Community, Annette Island Reserve v. Egan, Governor of Alaska, et al.*, No. 326, and in *Organized Village of Kake, et al. v. Egan, Governor of Alaska*, No. 327.

We are pleased to see that your study of these cases has led you to conclude that the court has jurisdiction and that the cases have not become moot. We are also pleased to note your position that the purpose of section 4 of the Alaska Statehood Act was to maintain the status quo until the Congress should provide otherwise. That is the position which this Department has consistently taken and which has been communicated to you in our prior correspondence and discussions.

In response to your invitation, we should like to restate and expand the expression of the views and position of the Department of the Interior on two points which are touched upon by the proposed brief

and which have been the subject of several discussions between representatives of our two departments. These being matters of predominant importance to the natives of Alaska they are, by that token, of the greatest concern to the Secretary of the Interior in his traditional role as the officer of the executive branch of the Government charged by law with the administration of Indian affairs and the execution of the national policy respecting the Indians.

The two points to which we refer are somewhat interrelated. They have to do with (1) whether the purpose and effect of section 4 of the Alaska Statehood Act, as amended, was to define and classify Indian fishing rights as vested, compensable property, and (2) the scope of the Secretary's regulatory power over the Indian fishing activity.

Section 4 of the amended Statehood Act preserves in status quo full Federal control over Indian lands and other property, including fishing rights. It does this in terms that withhold these matters from the reach of State authority, reciting specifically that they shall "be and remain under the absolute jurisdiction and control of the United States." Quite clearly, from the language of section 4 in its entirety as well as its legislative history, Congress manifested its intent to maintain the status quo, taking this action with knowledge of the prior rulings of the Supreme Court which recognized that the ultimate power to resolve the problem of native rights in Alaska rested with the Congress. See *Hynes v. Grimes*, 337 U.S. 86 (1949); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). This means to us that the Congress maintained in status quo the position of the United States as it existed immediately before statehood, namely, the continuation of full Federal control over the Indian fishing activity and the retention of full Federal power to define, classify, resolve and determine the nature and extent of Indian fishing rights.

Also, the Congressional purpose to maintain the status quo must mean to us that the Indians' rights, whatever their nature, were preserved under full Federal authority for ultimate determination by the Congress or the courts. The act made clear the lack of State authority but made nothing compensable as against the United States which was not compensable before statehood. We feel these conclusions must surely inhere in the conception that the Statehood Act was designed to maintain the status quo.

Any exercise by the Secretary of the Interior of regulatory power over the Indian fishing activities obviously must be by way of implementation of the Statehood Act and cannot be contrary to the Congressional objective of maintaining the status quo. So considered, the Secretary of the Interior in regulating the Indian fishing activity was required to continue the Indians' fish-trap operations as he found them to be immediately before statehood. The statute speaks in terms of the *natives'* fishing rights which, as we have demonstrated, are to be maintained in status quo until the Congress or the courts may clarify or resolve the matter. It follows logically that the natives' fishing rights could not be maintained in status quo by the Secretary of the Interior regulating their fishing activity in a way that would limit it to something less than that visible to the Congress when section 4 of the Statehood Act was enacted. Moreover, the Statehood Act, speaking in terms of native fishing rights cannot be equated into a grant of power to the Secretary to limit or eliminate Indian fishing. We must reject categorically the idea that section 4 of the Statehood Act, designed to maintain the status quo, also clothed the Secretary of the Interior with unlimited discretionary authority to limit or shrink the Indian fishing activity that existed on the instant before statehood. It has been recognized by the courts

that the power to regulate cannot be exercised in a way that abridges or destroys the Indian rights which are the subject of the regulation. See *Mason v. Sams*, 5 F. (2d) 255 (1925); *Tulee v. Washington*, 315 U.S. 681 (1942). And no remnants of regulatory power under the White Act (48 U.S.C. 221) could have survived the Statehood Act so as to clothe the Secretary with discretionary authority to limit or destroy the Indian fishing activity which Congress had held in status quo. The view that the Secretary of the Interior is clothed with full discretionary authority under the White Act to shrink the Indian fishing activity after the enactment of the Statehood Act undermines and makes ineffective the entire concept of Congress having maintained the status quo until it could resolve the problem of native rights as a matter of legislative prerogative. Indeed, the argument in favor of full discretionary authority in the Secretary to regulate Indian fishing after Alaska statehood must lead to the illogical conclusion that the Secretary of the Interior, being without Congressional direction or limitation, could not only limit the Indian fishing activity but could enlarge it as well. Here, again, the fallacy of the view that the Secretary has full discretionary authority is demonstrated merely by reference to the Congressional intention to preserve the status quo.

Historically, the purpose of retained federal controls in Indian matters has always been the protection of the Indians, and the Secretary of the Interior, in the exercise of regulatory authority over the subject denominated by the Congress as Indian "fishing rights" could not lose sight of the historical obligation to protect the Indians' rights, and to do so within the law.

To summarize:

1. The purpose and effect of section 4 of the Alaska Statehood Act was to maintain the status quo, leaving undisturbed after statehood the noncompensable character of those Indian fishing activities which were noncompensable before statehood.

2. The Secretary of the Interior, in exercising regulatory authority over the Indian fishing activity, must do so by way of implementation of the Statehood Act and cannot, by regulation, limit or terminate the fish-trap operations in which the Indians were engaged immediately before statehood.

Sincerely yours,

GEORGE W. ABBOTT, *Solicitor*.

[*Note:* By letter of August 3, 1961, to the Department of Justice, the Department of the Interior stated that it still maintained the views set forth in the Solicitor's letter of May 4, 1960, *supra*.]

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

Nos. 2 and 3

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND
RESERVE, a Federally Chartered Corporation,**
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska,
and THE STATE OF ALASKA, Appellees.

**ORGANIZED VILLAGE OF KAKE, and ANGOON COMMUNITY
ASSOCIATION, Appellants,**

v.

WILLIAM A. EGAN, Governor of Alaska, Appellee.

**ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF ALASKA**

BRIEF FOR APPELLEES

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IN THE
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**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND
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v.

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v.

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**ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF ALASKA**

BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Supreme Court of Alaska is reported at 362 P. 2d 901 (1961). A copy of the opinion is contained in the separate Appendix filed with the Statement as to Jurisdiction, Nos. 2 and 3, O.T.

1961, by appellants herein. (Citations to the opinion ("Op.") refer to pages in the Appendix.)

The opinion of the District Court for the District of Alaska, from which appeal was initially taken to this Court, is reported at 174 F. Supp. 500 (R. 59-66).

The opinion earlier entered by this Court is reported at 363 U.S. 555 (1960). The opinion of Mr. Justice Brennan, granting appellants a stay of execution pending the outcome of their appeals, is reported at 4 L. Ed. 2d 34, 80 S. Ct. 30 (1959).

JURISDICTION

Probable jurisdiction was noted by this Court on October 23, 1961. Jurisdiction rests on 28 U.S.C., Sec. 1257(1), (2).

QUESTIONS PRESENTED

1. Does Ch. 17, SLA 1959 as amended, forbidding the use of fish traps, apply to appellants Kake and Angoon?

A. Does Sec. 4 of the Alaska Statehood Act, by which the State disclaimed control over native "property (including fishing rights)" deprive the State of authority to regulate appellants' method of fishing?

B. In the absence of express disclaimer of state jurisdiction in the Statehood Act, do state fisheries regulations apply to Kake and Angoon as well as to other Alaskan areas?

2. Does Ch. 17, SLA 1959 as amended, forbidding the use of fish traps, apply to appellant Metlakatla?

A. Do the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. Sec. 358, the Presidential Proclamation No.

1332, 39 Stat. 1777, as ratified by the Act of May 7, 1944, 48 Stat. 667, and Sec. 4 of the Alaska Statehood Act, all of which set aside and preserved a temporary area for the exclusive fishing use of the Metlakatla, deprive the State of control over the methods of fishing within that area?

B. In the absence of express deprivation of state jurisdiction through this series of official acts, do state fisheries regulations apply to Metlakatla as well as to other Alaskan areas?

STATUTES INVOLVED

The statutes, Presidential Proclamation, regulations, involved are lengthy, and are set forth in Appendix A of this brief. Included therein are the pertinent portions of:

1. Alaska Statehood Act, Sec. 1, 72 Stat. 339.
2. Alaska Statehood Act, Sec. 4, 72 Stat. 339.
3. Alaska Statehood Act, Sec. 6(e), 72 Stat. 340-341.
4. Alaska Omnibus Act, Sec. 2, 73 Stat. 141.
5. White Act, Sec. 1, 43 Stat. 464, amended 44 Stat. 752, 48 U.S.C., sec. 221 et seq.
6. Treaty of Cession, Art. VI, 15 Stat. 539.
7. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777.
8. Act of May 7, 1934, Sec. 3(c), 48 Stat. 667.
9. Session Laws of Alaska 1959, Ch. 17, Sec. 1, as amended by Session Laws of Alaska 1959, Ch. 95.
10. Session Laws of Alaska 1959, Ch. 95, Sec. 1.
11. C.F.R., Tit. 25, Ch. 1(H), Part 88.2 (Supp. 1961).

STATEMENT OF THE CASE

Since time immemorial, Alaska has been blessed with a natural food resource in the form of annual migrations of salmon. Responding to instinct, the fish seasonably form in huge schools in the salt water, enroute to the mouths of the fresh water rivers and streams they will soon enter. At a time dictated primarily by instinct, the schools commence a mass movement from the sea toward the mouths of the rivers and streams. It is at this time of migration that the commercial fishing for salmon occurs. The annual harvest may well be said to be the bulwark of the entire Alaskan economy. ROGERS, ALASKA IN TRANSITION, p. 94 (1960).

During Alaska's territorial status, exclusive regulatory control over the commercial fisheries was exercised by the Federal Government. Regulations specifying legal means of fishing as well as permissible areas of fishery were promulgated by appropriate federal agencies acting under congressional authorization. Under the statutory framework of regulation, all fishermen in Alaska were treated as equals. While Alaska's commercial fishing population was composed of nearly one-half native fishermen,¹ they were never subject to different regulations or distinguished in any way from their fellow citizens.

During the years of federal regulation, the fish trap came into existence and use. A trap consists, first of all, of a wire or webbed fence, stretched from the shore

¹ The 1950 census indicates that a total of 3,121 Alaskans are employed in the fishing industry. Of that total, 1,317 are non-whites. U.S. Bureau of the Census, United States Census of Population: 1950, Vol. II, Part 51.

to the seaward and from the ocean bottom upward to a point above the high water mark. Located at the seaward end of the fence is an opening into the heart or pot. The trap operates in conjunction with the recognized fact that salmon parallel the shoreline in traveling toward their spawning streams on an incoming tide. Fish traveling in such a manner are temporarily halted by the webbing stretched from the trap to the shoreline. As a result, the fish turn seaward in an attempt to avoid the obstruction, eventually being diverted into the heart or pot, where they remain until removed.

The effect of traps upon the fishery can be devastating,² and it is not surprising that public opposition to them appeared quickly in Alaska when the steady depletion of the resource became evident. Denied the power to regulate the fisheries, Alaskans took the only course open to them. From 1913 to statehood, Alaskans pleaded with federal authorities to regulate or abolish traps.³ Opposition was not restricted to white fishermen. Native fishermen, who comprised nearly half of the total fishing population, suffered equally from the

² The tremendous effect that even one trap can have upon the fishery was noted by this Court in *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918).

³ Opposition took the form of memorials to Congress from the Territorial Legislature, e.g. SLA 1931, 275; SLA 1947, 325-6; SLA 1953, 401-2; SLA 1955, 447-8.

depletion of salmon and strove equally hard for the abolition of this particular means of fishing.⁴

In 1956, the Alaskan people adopted a constitution in hope of imminent statehood. In conjunction with that constitution, the people similarly adopted Ordinance #3, which was to become effective on the same date as the constitution. That ordinance read;

“As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of

⁴ It is significant that as recently as November, 1959, when the only traps operating in Alaska were native traps, the Alaska Native Brotherhood reiterated its stand for complete abolition of traps. The resolution adopted by that group is as follows:

“Convention at Yakutat, November 9-14, 1959.

RESOLUTION NO. 64-36, INTRODUCED BY KLAUOCK, CAMP #9

ENTITLED: Abolition of all Fish Traps

Whereas, the native people of Alaska, through their officially recognized organization, have consistently opposed the use of fish traps in Alaskan waters, and

Whereas, their opposition to these fish traps is in no way contrary to the State Constitution of Alaska,

THEREFORE BE IT RESOLVED that this convention of the Alaska Native Brotherhood and the Alaska Native Sisterhood reiterate our stand for complete abolition of traps, and that a copy of this resolution be directed to the Governor of Alaska.

/s/ A.E. WIDMARK

Grand President, A.N.B.

Attest

/s/ C.E. PECK

Grand Secretary, A.N.B.”

The prominence of the ANB as native spokesman is discussed in COHEN, FEDERAL INDIAN LAW, p. 963 (revised by Dept. of Interior 1958); also see GRUENING, STATE OF ALASKA, 397-8 (1959).

salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

Ordinance No. 3 was adopted by a vote of 21,285 to 4,004 (Op. 9).

On January 7, 1958, in response to Alaskan desires, Congress passed the Statehood Act, providing for the subsequent admission of Alaska to the Union. 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959). Section 6(e) of that Act provided for the termination of federal control over the regulation of Alaskan fish and wildlife. Federal authority was to terminate upon the state's establishing certain required regulatory machinery of its own. No provision was made in Sec. 6 for any continuation of federal management.

However, Section 4 of the Statehood Act did exempt from state control certain native fishing rights in conjunction with a general reservation to the Federal Government of control over "... property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts ... or is held by the United States in trust for said natives; ..." It is over the scope of the disclaimer in Sec. 4 that this legal controversy has arisen.

On January 3 of 1959, Alaska was admitted to the Union. Shortly thereafter, the Alaska Legislature adopted legislation to implement Ordinance #3, banning the use of fish traps for use in commercial fishing. Chapter 17, SLA 1959, as amended by Ch. 95, SLA 1959. No exception was made in the statutory prohibi-

tion for natives or native communities which, until statehood, were always subject to general fisheries regulation.

Following the enactment of Ch. 17, SLA 1959, the Secretary of the Interior issued regulations banning the use of fish traps in the State. The Secretary's action was predicated on the theory that the State had not yet established its system of fish and game management and therefore, under Sec. 6(e) of the Statehood Act, he was required to manage Alaska's fisheries. In addition, the Secretary felt that his position was that of trustee-administrator for state laws, thereby requiring him to adopt regulations similar to state desires. The Secretary's action and views were upheld. *Ketchikan Packing Co. v. Seaton*, 267 F. 2d 660 (D.C. Cir. 1959).

However, in issuing the regulatory ban, the Secretary refused to adopt the complete prohibition prescribed by state statute. Under the theory that Sec. 4 of the Statehood Act placed all native fishing of any nature exclusively under federal control and made state laws inapplicable to native fishermen, he exempted certain fish traps owned by natives from the general prohibition (S.R. 85, 104-5, 131-2). In particular, traps at Kake, Angoon and Metlakatla, three Alaskan villages, were authorized. 24 Fed. Reg. 2053.⁵

On April 17, 1959, the State adopted a comprehensive fish and game regulatory code in compliance with the Statehood Act, and subsequently assumed full manage-

⁵ In 1960 the Secretary again adopted regulations authorizing appellants' traps with one modification. While the original regulations only granted permission to operate traps for the 1959 fishing season, the present regulations grant the privilege for an indefinite duration. C.F.R., Tit. 25, Ch. 1 (II), Part 88.2 (Supp. 1961).

ment authority over the fisheries resource. On June 17, 1959, after prior warning to the Secretary that the State would enforce its laws equally on all citizens, state officers arrested several persons and seized one trap on which pre-season work was being performed.

Actions for restraining orders were immediately commenced by appellants in the District Court for the District of Alaska. On motion by the appellees, all complaints were dismissed (R. 59-66), 174 F. Supp. 500 (1959). Appeal was taken directly to this Court, due to the fact that the present Alaska Supreme Court had not yet been organized. (R. 79.) Pending the final outcome of the appeals, a stay was issued by Mr. Justice Brennan on July 11, 1960. 4 L. Ed. 2d 34 (1960).

On June 20, 1960, this Court noted jurisdiction but reserved decision on the merits. 363 U.S. 555 (1960). The cases were remanded to the newly created Supreme Court of Alaska with directions to determine first whether the state legislation in issue was meant to apply to the appellants, and second, whether the exercise of the state police power was justified.

The Supreme Court of Alaska, after full argument, unanimously affirmed the District Court's decision. After first construing Ch. 17, SLA 1959 as amended as fully applicable to appellants as well as other state citizens, the court upheld the statute's validity by ruling that Sec. 4 of the Statehood Act did not deprive the State of regulatory control over native fishing. As fish traps possessed no special status their abolition was held to be within the scope of state power. Appeal has again been made to this Court.

The appellants in this controversy are three primarily native communities in Southeastern Alaska.

None of them claim any aboriginal or historical use of fish traps. The Metlakatians immigrated from Canada in 1887, and have used fish traps since 1914. *Alaska Pacific Fisheries v. U. S.*, 248 U.S. 78 (1918). Kake and Angoon commenced using fish traps in 1950 and 1948 respectively (R. 83, 102). The fish traps used by appellants have been used only at such times as the same have been authorized by the Secretary of the Interior under general fishing regulations applicable to the whole of Alaska, promulgated pursuant to the authority of the White Act and similar fisheries legislation, "for the purpose of protecting and conserving the fisheries." Sec. 1, 43 Stat. 464, 48 U.S.C., Secs. 221-224. Pursuant to Sec. 1 of the White Act, all Alaskans—Indians, whites, and half bloods—partaking in the commercial fishery have received common treatment and no special privilege to use traps have ever been granted to appellants as communities or to their inhabitants as individuals.

The one difference between appellants Kake and Angoon and appellant Metlakatla lies in the fact that in 1916 the Government set aside for the Metlakatians a water area within which they alone could fish. In all other respects the communities are similar.

SUMMARY OF ARGUMENT

The rights and duties of appellants in this case are essentially dependent on a question of statutory interpretation. If Alaska was admitted to the Union under an enactment which retained control of the fishing activities of appellants to the Federal Government, their conduct is free from state interference. If, on the other hand, no such exception was made, the State has full regulatory control over them as it does over the rest of its citizens.

The only exception to state authority over native fishing is provided in Sec. 4 of the Statehood Act. That section provides that Alaska forever disclaims all right and title to "property (including fishing rights)" held by natives, or held by the Government in trust for them. The extent of the disclaimer is limited by two requirements. First, the claim must be in the nature of a native "right," or at least a type of claim which may be parenthetically included within the term "property." Second, and equally important, the "right" must have been "held" at the date of passage of the Statehood Act. All parties agree that Congress, in adopting Sec. 4, merely meant to maintain the status quo, and not to *create* new rights.

Prior to statehood, all fishing in Alaska was conducted under regulations adopted by the Department of the Interior. Under those regulations, areas where fishing could be undertaken, the times when fishing was permissible, and the types of equipment that could be used in particular areas were specified. The use of fish traps or any other kind of equipment under this comprehensive regulatory scheme created no "rights" of any kind in the operator. The Government was free to terminate the use of traps by a change in the regulations. Similarly, the use of a site for trap fishing gave no "rights" against subsequent appropriation of that site by another trap operator. Without any previously established right to use a trap, appellants cannot claim that their trap operation is exempted from state control by Sec. 4.

Appellees do not mean to infer that there are no native fishing rights in Alaska. There are such rights, established by Congress, and their nature will be subsequently discussed. None of them are in issue here.

Past federal regulations governing the use of fish traps possessed no special status in the over-all regulatory program. Therefore, appellants' contention that their use of fish traps was a "right" as defined in Sec. 4 implies of necessity an interpretation of Sec. 4 that deprives the State of *all* regulatory control over native fishing. This interpretation is completely inconsistent with past congressional policy, which has been both to treat all fishermen in common, and to hasten the complete integration of the native peoples into the general society. The interpretation is similarly inconsistent with the rest of the Statehood Act, which provides for the complete termination of federal control over the Alaskan fishery and transfer of all properties previously necessary for management to the State. Finally, the very impact of such an interpretation indicates its fallacy. Natives comprise nearly one-half of Alaska's fishing population. If one sovereign is to completely regulate half of the fishermen, while another regulates the other half, it may well follow that neither sovereign can perform an adequate regulatory function. The efforts of one may be cancelled out by the efforts of the other, to the detriment of the entire population, native and non-native.

Therefore, the disclaimer in Sec. 4 cannot by any standards be interpreted to mean that control of all native fishing is in the hands of federal authorities. Section 4 only has application to certain congressionally created native fishing rights, none of which are in issue here.

Nor does the fact that Metlakatla was established within the confines of an exclusive fisheries reserve forbid the State from imposing reasonable conservation measures in regulating the fisheries within that

reservation. Regulation of this nature is not inconsistent with the purpose for which the reserve was created. Prior to statehood, the Metlakatlans were granted an exclusive fisheries reservation, but they were not given any rights to take fish by means forbidden to other Alaskan citizens. Congressional policy has never sought to free Metlakatlans from general fisheries regulation, but only to forbid trespassers in the water area. The Metlakatlans may have possessed a right to fish exclusively in an area, but that right alone was preserved under the Statehood Act.

Since regulatory control over native fishermen and fisheries was not reserved in the Statehood Act, it passed to the State as a natural concomitant of its admission to the Union on an equal footing with other states. The State, therefore, has full authority to regulate appellants' fishing activity, and in particular to forbid their use of traps.

ARGUMENT

I. KAKE AND ANGOON ARE SUBJECT TO STATE LAW FORBIDDING FISH TRAPS

A. SECTION 4 OF THE ALASKA STATEHOOD ACT DOES NOT BAR APPLICATION OF STATE LAW PROHIBITING THE OPERATION OF FISH TRAPS TO KAKE AND ANGOON

Introduction

The express disclaimer which is the crux of this litigation is found in Sec. 4 of the Alaska Statehood Act. That section provides in part:

"As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to . . . any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said na-

tives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority . . ." 72 Stat. 339 (1958), amended by 73 Stat. 141 (1959).

Appellants contend that the disclaimer over property (including fishing rights) in Sec. 4 deprives the State of Alaska of authority to restrict the operation of their fish traps. In actuality, the nature of appellants' claim goes far beyond the validity of this particular state restriction. While this controversy centers about state regulation of a particular means of commercial fishing, there is nothing unique about the means involved. The regulation or abolition of fish traps is but one phase of an over-all fisheries management program which regulates all means of fishing, in addition to setting the times and areas where fishing is permissible. If appellants are free to use traps, they are similarly free to use any form of fishing equipment, to fish at any place, and at any time, entirely free of state control. Indeed, Kake and Angoon frankly admit that their urged interpretation of Sec. 4 would deprive the state of regulatory control over all native fishing of any kind (KABR 11). The United States apparently supports this broad interpretation (USBR 12).

Appellants' interpretation of necessity equates the disclaimer over native fishing *rights* with a hypothetical disclaimer over native *fishing* in general. The interpretive equation is both unwarranted and erroneous. First, it distorts the clear language and accepted mean-

ing of the words in Sec. 4; second, it disregards nearly 100 years of congressional policy toward Alaskan natives; third, it is inconsistent with the rest of the Statehood Act; and fourth, such an interpretation would have an effect so absurd as to demonstrate its invalidity.

(1) Kake and Angoon had no "fishing rights" as were disclaimed by the State of Alaska in Sec. 4 of the Statehood Act

In ascertaining the scope of the disclaimer of state jurisdiction prescribed by Sec. 4, several points are immediately obvious. First, the State only disclaimed as to rights "held" by or for natives at the date of the Act. No new rights were to be created.⁶ Second, only fishing "*rights*" were disclaimed by the State. Section 4, by its terms at least, does not provide a state disclaimer over all native "fishing." Finally, the over-all disclaimer is over native "property." Fishing rights are only parenthetically included.

Native property rights, including fishing rights, have a well defined judicial meaning. Unless subsequently it appears that Congress intended to deviate from those established definitions, the scope of the disclaimer should be measured by them.

⁶ That Congress sought to maintain the *status quo* is evidenced not only by committee reports on the actual Statehood Act, but by reports on similar language contained in previous statehood acts which failed of passage. E.g. H.R. Rep. No. 88, 84th Cong., 1st Sess., 47; H.R. Rep. No. 624, 85th Cong., 1st Sess. 19; S. Rep. No. 1929, 81st Cong., 2d Sess. 1, 2, 11 (1950); H.R. 331, 81st Cong., 2d Sess. (1949); H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949). Indeed, the appellants agree that Congress fully intended to maintain the *status quo* (MEBR 30) (USBR 20-21). The controversy has arisen in determining what Congress thought the *status quo* to be at the time of statehood.

Indian rights in property may be categorized in two groups. First, there is "recognized" Indian right or title. The recognition spoken of in this context is that of the Federal Government, which through treaty or act of Congress creates certain rights in Indians. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-8 (1951). A recognized right is not only protected against interference by third parties, but upon a subsequent taking by the Government gives rise to a compensable claim. *United States v. Creek Nation*, 295 U.S. 103 (1935).

The second classification of Indian rights is "unrecognized" right or title. This classification may in turn be subdivided. First, Indians may possess aboriginal rights, gained from continuous and exclusive exercise of the right from time immemorial, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). Second, the Government may create for Indians certain temporary rights subject to subsequent modification or abolition. *Aleut Community of St. Paul Island v. United States* (Ct. Cl. 1954), 177 F. Supp. 427; *Ute Indians v. United States*, 330 U.S. 169 (1947).

The basic distinction between recognized and unrecognized rights lies exclusively in the parties against whom the right is enforceable. Recognized title is enforceable against the Government and third parties. Unrecognized title is only valid against third parties.

If Kake and Angoon are to succeed in their contention that they possessed "rights" at the date of the Statehood Act which were disclaimed by the State of Alaska, it is incumbent upon them to specify the nature of those rights. Appellees will concede that so far as they are concerned, as third parties it is insignificant

whether the right was recognized or unrecognized. However, it must be one or the other if it is to be classified as a right at all.

Appellants have made no claims that they possess any recognized rights of property or fishing in Alaska (KABR 24). The absence of treaty or congressional act establishing such rights precludes their existence. Any rights claimed by appellants, then, must take the form of unrecognized rights. Appellants must show that they have gained and preserved an aboriginal claim, or that the Government has acted to create rights in them protected against third parties.

The present existence of any aboriginal rights in Alaskan natives was expressly repudiated in *Miller v. United States*, 159 F. 2d 997, 1001-2 (9th Cir. 1947); overruled on other grounds, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1951). The Court relied on Article VI of the Treaty of Cession, 15 Stat. 539, by which all dominion over Alaska was passed from Russia to the United States "free and unencumbered by any . . . possessions . . . except merely private individual property holders; . . ." Since aboriginal title is clearly tribal and not private in nature (*Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902)), the Court concluded:

"It seems quite clear, therefore, that whatever 'possession' the Tlingit Indians had 'from time immemorial prior to' the year 1867 was a tribal and not an individual right, and did not come within the classification of the excepted 'private individual property' specified in the Russian treaty. Consequently, the Tlingits' 'original Indian title' to the tidelands in question was extinguished by that state paper." *Id.* at 1002.

Even assuming contrary to the *Miller* case that aboriginal fishing rights did survive the Treaty of Cession, it is clear that these rights were subsequently destroyed. With the exceptions of the Metlakatla and Karluk fishery reserves, Congress has declared all waters in Alaska open to a public fishery. Since 1924, the fishery was managed under the White Act, which specifically forbade the granting or protection of exclusive or several rights in Alaskan waters. Section 1, 43 Stat. 464, 48 U.S.C., Secs. 221-224. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). It is difficult to see how Congress could have repudiated the continued existence of aboriginal fishing rights in a more definite manner. Aboriginal rights, by their very nature, are exclusive rights. *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 326 (1941). By an express negation of exclusive rights, therefore, Congress terminated their existence. It is indisputable that Congress was fully empowered to abrogate any such aboriginal rights. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1951).

The ethical considerations inherent in such a taking need not be considered here. Suffice to say that the natives are not without recourse. Under a special jurisdictional act, the Court of Claims has recently granted these very natives a right of compensation for the taking of their aboriginal rights.⁷ *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452 (1959). The court specifically noted that:

⁷ Appellants claim that the *Tlingit and Haida* case held that aboriginal fishing rights "exist" (KABR 29, n. 25). This claim confuses the present with the past. The Court held that while aboriginal rights had *existed*, they had been extinguished by subsequent government action. Indeed, this was the very grounds on which a compensable right was granted.

"The most valuable asset *lost* to these Indians was their fishing rights in the area they once used and occupied to the exclusion of all others . . ." (Emphasis supplied.) *Id.* at 468.

The area considered in the Court of Claims proceedings encompasses the area in which these fish traps are now operating. It would indeed be anomalous if the same natives who have been granted a right to compensation for a taking of their historical rights would be permitted to predicate their present claim on the continued existence of those rights.

It is equally impossible to find any congressional or executive action which established unrecognized rights in these natives. Kake and Angoon have always fished under the commercial fisheries regulations applicable to all of Alaska. They have never been distinguished from other Alaskan fishermen. The traps they have used have been authorized under regulations which permitted any person to use traps within the particular area.⁸ Therefore, if appellants received any

⁸ For example, in 1958 the traps used by Kake and Angoon were operated under the following regulation of the Department of the Interior (C.F.R., Tit. 50, Ch. 1, (f) (1958)):

"Sec. 115.27. *Areas open to traps.* The use of any traps for the capture of salmon is prohibited, except as follows:—

• • • • •

"(b) *Western District.*

• • • • •

"(4) Chichagof Island: East coast . . . (iii) from 57°36'37" N. lat. to 57°35'52" N. lat., . . .

• • • • •

"(11) Admiralty Island: West coast from 57°22'07" N. lat. to Distant Point.

• • • • •

"(13) Admiralty Island: West coast . . . (iii) within 1,000

unrecognized rights, those rights of necessity must have been created from the mere fact that appellants were permitted to fish on the same basis with other fishermen.

The creation of a protected right from completely equal treatment is at best difficult to comprehend. But it is not necessary to deal in abstractions. Federal courts in Alaska have previously had opportunity to consider whether the mere act of fishing, and contextually, the operation of fish traps under general fisheries regulation created any sort of rights in the operator.*

feet of 57°13'57" N. lat.

• • • • •

"(c) *Eastern district* . . .

• • • • •

"(4) From the south side of Fanshaw Bay at 133°32'27" W. long. to Cape Fanshaw thence southeasterly to 133°29'57" W. long.

"(5) Admiralty Island: Southeast coast (i) from Point Pybus to 57°18'57" N. lat.; and (ii) from 57°20'07" N. lat., 133°54'58" W. long. to False Point Pybus.

• • • • •

"(9) (i) From a point $\frac{1}{2}$ statute mile southeast of Point Macartney to Point Macartney; (ii) within 2,500 feet of 57°03'23" N. lat., 134°01'51" N. lat., 133°56'13" W. long.

"(10) Within $\frac{1}{4}$ statute mile of Cornwallis Point.

The traps operated by Kake and Angoon were within the above designated areas. Any person, community, or association was equally free to operate traps therein.

* The relevance of local law on the question of whether "rights" exist is indicated by the decision of this Court in *Damon v. Territory of Hawaii*, 194 U.S. 154 (1904); *Boquillas Land and Cattle Co. v. J. N. Curtis*, 213 U.S. 346 (1909). These decisions are applicable when the Act which speaks of "rights" is adopted by the same sovereign who previously determined the existence of "rights." Here, the Federal Government occupies both positions.

The answer has been unequivocally negative. No individual or community had a "right" to operate a fish trap—even one enforceable against third parties. *Thlinget Packing Co. v. Harris and Co.*, 5 Alaska 477 (D. Alas., 1st Div., 1916); *Columbia Salmon Co. v. Berg*, 5 Alaska 538 at 546 (D. Alas., 3d Div., 1916); *Fischer v. Everett*, 11 Alaska 1, 66 F. Supp. 540 at 542 (D. Alas., 3d Div., 1945); *Canoe Pass Packing Co. v. United States* (9th Cir., 1921), 270 F. 533. Neither previous use nor large investment was sufficient to create such a right. *General Fish v. Markley*, 13 Alaska 700, 105 F. Supp. 968 (D. Alas., 3d Div., 1952). Fish traps were treated in law as entirely similar to all other fishing equipment. The individual who first started operating the device had a priority purely because of his physical location, much as only one net can fish in a specified area of water at one time.

In conjunction with the fact that native rights *were not* created by participation in the fishery under general regulatory authority, this Court has previously held that such rights *could not* have been created. In *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948), the Court struck down an attempt by the Secretary of the Interior to utilize his general regulatory authority over Alaska's fisheries in creating an exclusive native fishery. The Court held that the intent of Congress, as clearly expressed in the White Act, was to forbid creation of exclusive rights or privileges in any group, regardless of whether they were natives or not. *Id.* at 120-123.

Therefore, prior to statehood, appellants Kake and Angoon had neither recognized nor unrecognized fishing rights. Their use of traps could be freely abolished by the Government. It could similarly be validly in-

fringed upon by third parties, competing on an entirely equal basis in the general fishery. They possessed no "fishing rights" whatsoever, and in particular, no rights to operate fish traps or any other form of fishing gear.

A reference to certain legitimate native fishing rights created under federal control, may tend, by comparison, to clarify the prior discussion. While Alaskans in general have been forbidden to take fur seals, certain natives have been permitted to take them for subsistence. Act of February 26, 1944, 58 Stat. 100, 16 U.S.C., Sec. 631(c); and see *Aleut Community of St. Paul Island v. United States* (Ct. Cl. 1954), 177 F. Supp. 427. This is not a *recognized* right in that it may be terminated by the Government at any time, but it clearly is a right in that it can be validly protected against third parties. The seal fishery¹⁰ is not the only place where native rights have been created. By executive order, the natives of Karluk have been provided with an exclusive fisheries reserve. Public Land Order 128, issued pursuant to Executive Order 9146, April 24, (1942), 1 C.F.R., Cum. Supp. 1149. While the withdrawal by executive order probably did not create a compensable interest in the natives upon subsequent abolition of the reserve, it did create a right of occupancy protected against third parties. While Metlakatla's rights will subsequently be discussed in detail, it is significant for the present to note that an exclusive fishing area was temporarily reserved to them—first by executive order, and subsequently by Congress itself. Presidential Proc. #1332, 39 Stat. 1777; Act of May 7, 1934, 48 Stat. 677. The withdrawal, by its specific

¹⁰ Seal "fishery" is the accepted terminology. COHEN, *FEDERAL INDIAN LAW*, 944-945 (revised ed. 1958).

temporary terms, probably did not create a recognized right, but unquestionably did create a right of exclusive use as against other fishermen. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). In addition to these federally created rights, it is possible that certain natives in the Interior of Alaska, who have taken salmon for *subsistence* since time immemorial, still retain their aboriginal rights to do so.¹¹

These rights are noted purely for the purpose of indicating that Congress, in using the phrase "fishing rights," was not speaking loosely. There are such rights in Alaska, and these rights are protected from state interference. But it is *only* those rights which are protected.

There is additional evidence of the fact that in speaking of native fishing rights Congress specifically had in mind recognized and unrecognized rights, rather than some new concept of "right." Section 4, after first reserving control over native "fishing rights" to the Federal Government, states:

"... *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to

¹¹ The natives on the Yukon and Kuskokwim Rivers have historically gained their sustenance by fishing, using small hand traps and fish wheels. Chapter 17, S.L.A 1959, as amended, specifically excludes small hand driven traps from the general fish trap ban.

any such claim shall be unaffected by anything in this Act: ..."

This provision is clearly couched in the terminology of recognized and unrecognized rights. Congress did not wish, by reserving control over unrecognized rights as well as recognized ones, to imply that those unrecognized rights thereby became recognized. But most important, the provision indicates that Congress was specifically aware of the legal nature of the rights they were dealing with. When the terminology "fishing rights" was used, it was with full knowledge of the fact that those words had well defined meanings. Indeed, the Government in its argument makes specific note of the fact that the nature of Indian "rights," recognized and unrecognized, was fully explained to Congress in hearings on the Statehood Act. (USBR 18, 19.)

Congress, then, in Sec. 4 preserved all fishing rights of natives. But in doing so, they did not enlarge traditional legal concepts of native rights. Parties for whom rights were never created or protected cannot claim an exemption from state regulation under a section that was obviously intended only to apply to specific rights. Since Kake and Angoon cannot claim fishing rights of any nature—recognized or unrecognized—their fishing activities are not exempt from state regulation under Sec. 4.

(2) Appellants' interpretation of Sec. 4 is inconsistent with past congressional policy toward Alaskan Indians

Congressional action touching on Indian affairs should clearly be interpreted within the framework of past congressional policy toward that Indian group. *United States v. Chavez*, 290 U.S. 375 (1933). Radical

departures from that standard are not favored. It is therefore highly relevant to examine congressional policy toward Alaskan natives prior to statehood. For if congressional policy has clearly been to treat natives on an entirely equal basis with whites, it would be a distorted inference to claim that a continuation of that policy in actuality meant the formation of an entirely new approach of separation and special treatment. Cf. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 603-4 (1943).

The early history of federal policy toward Alaskan natives differed enormously from the policy toward Indians in the lower states. With vast areas of land and few occupants, there was no danger of hostilities which accompanied the expansion westward. No treaties were ever entered into with Indian groups, though the treaty power was still available at the time of Alaska's purchase.¹² No reservations were set aside for their exclusive use. Initially, at least, the natives were left to make their own amalgamation into the white society as best they could without federal aid.

Integration came quickly. As early as 1886 one federal court, in commenting on the status of the Indian groups, noted:

"What, then, is the legal *status* of Alaska Indians? Many of them have connected themselves with the mission churches, manifest a great interest in the education of their youth, and have adopted civilized habits of life. Their condition has been gradually changing until the attributes of their original sovereignty have been lost . . ."

¹² Alaska was purchased on June 20, 1867. The power to enter into treaties with Indian tribes was effectively terminated by the Act of March 3, 1871, 16 Stat. 544, 546.

In re Sah Quah, 31 Fed. 327 (D. Alaska 1886) at 328.

The same judge recognized another fact which is unique to Alaskan natives. Unlike their counterparts in other states, the natives' social organization was not tribal. There was no such organization as would permit them to exercise independence from, or supremacy to, generally applicable laws. *Id.* at 329.

These two factors are dominant in Alaska native history. First, the tribal status, if indeed it ever existed, exists no more.¹³ Second, amalgamation into the civilized community proceeded at an amazing pace, considering the fact that initially no federal aid was

¹³ That Congress was fully aware of the absence of tribal type affiliation in many areas of Alaska is borne out by the terms of the Wheeler-Howard Act, which, when it was extended to Alaska, provided:

"Sec. 473(a). Same; application to Alaska

Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska; *Provided*, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well defined neighborhood, community, or rural district may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title." Act of May 1, 1936, Ch. 254, Sec. 1, 49 Stat. 1250, 25 U.S.C. Sec. 473(a).

Compare this phraseology with Sec. 476, 25 U.S.C. applying to other American Indians:

"Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws. . . ."

Also see *Tlingit and Haida Indians v. United States*, 177 F. Supp. 452 at 463 (1959).

granted to ease the transition from one civilization to another.

The first real federal interest in Alaska's native population was indicated in 1905, when an ethnologist was delegated to investigate the status of Alaskan natives. The subsequent report divided natives into two groups for the purpose of future federal policy toward them. The first classification is of interest here. It was composed of native peoples who were, to a large extent, self-sustaining, had nearly completely amalgamated into the white society, and needed only supplementary federal programs to aid them further. That self-sustaining group was composed of the Tlingits, the Haidas, and the Tsimshians, all of whom are appellants here. *Condition and Needs of the Natives of Alaska*, 58 Cong., 3d Sess., Sen. Doc. 106.

In recognition of this continuing process of amalgamation, Congress sought to aid rather than detract from it. With two extremely limited exceptions no native reservations were ever established in Alaska. Whatever their value in other states, reservations in Alaska were condemned as racial segregation and discrimination in its worst form. *United States v. Libby, McNeill & Libby*, 14 Alaska 37, 107 F. Supp. 697 (D. Alas. 1952). Congress did not exclude Indians from territorial taxation. Crimes committed by Indians in Alaska have always been punished by territorial and state courts, and criminal law is applicable to all Indians wherever situated and regardless of the nature of the offense.¹⁴ *United States v. Booth*, 17 Alaska

¹⁴ *Petition of McCord*, 17 Alaska 162, 151 F. Supp. 132 (D. Alas., 1957) represents an exception to this general statement. The case is unique in this area of Alaska law, and is distinguished in *United States v. Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958).

561, 161 F. Supp. 269 (D. Alas., 1958). The Territory, and now the State, have traditionally afforded equal educational opportunities to white and native alike. Indeed, the educational facilities for the three appellants in this action are state facilities. Federal authorities have not only sanctioned this practice, but advocated the complete transfer of all federal educational facilities to state control.¹⁵ The vote was granted to Alaska with no differentiation as to whites and natives. Act of August 24, 1912, Ch. 887, Sec. 5, 37 Stat. 513, referring to Act of May 7, 1906, Ch. 2083, Sec. 3, 34 Stat. 170. The natives have not only exercised their voting privileges but have held many high elective offices. Of the 60 members of the First State Legislature, nine were natives. The president of the Senate, William Beltz, was an Eskimo. Senator Frank Peratrovich, of Tlingit ancestry, succeeded Senator Beltz. Senator Peratrovich, incidentally, was elected from an election district composed 78.3% of whites. ROGERS, ALASKA IN TRANSITION, 55 (1960).

But the clearest indication of congressional policy was found in federal management of the commercial fisheries. In Alaska's greatest industry Congress refused to segregate or distinguish fishermen on the basis of race. The White Act, under which Alaska's commercial fisheries were managed, specifically directed that regulation was to be generally applicable, and could not be utilized for the benefit of one racial group or another. *Hynes v. Grimes Packing Co.*, 337 U.S.

¹⁵ In 1951, the Area Director of the Alaska Native Service officially stated: "Plans are being completed whereby all ANS schools will be transferred to Territorial responsibility in an orderly manner and on a yearly basis by 1960." *Annual Report of the Governor of Alaska*, 80 (Fiscal Year 1952).

86 at 120-123. Where natives were dependent upon fisheries for *sustenance*, Congress made exceptions. But in the vast areas of Alaska, where commercial rather than subsistence fishing occurred, all were treated equally.

The over-all policy of Congress was eminently successful. In the words of one federal judge:

"... [T]he Indians of Southeastern Alaska, and particularly the Haidas, have not only abandoned their primitive ways and adopted the ways of civilized life, but are now fully capable of competing with the whites in every field of endeavor. It is a matter of common knowledge that today the Indians of Southeastern Alaska prefer the white man's life despite all its evils and shortcomings . . ." *United States v. Libby, McNeill & Libby*, 14 Alaska 37, 107 F. Supp. 697 at 699 (D. Alas., 1952).

Appellants now take the position that in passing the Statehood Act, Congress sought to ignore nearly 100 years of consistent policy toward establishing common treatment of both races. It seems illogical to claim that after consistently treating all Alaskans equally in regard to fishing as well as other phases of life, Congress suddenly desired to reverse itself—to segregate Alaskans on the basis of race—to grant to Alaska control over white fishermen, but not over native.

The claim is particularly illogical in light of the fact that in spite of a general equality of treatment, Congress did previously establish certain specific native rights of fishery, the nature of which have been previously discussed. In such cases a continuation of congressional policy would imply a continual protection. But these are specific rights—not general con-

trol. A limited interpretation of Sec. 4 has the merit of only continuing those distinctions that Congress previously sanctioned, and of not creating new artificial distinctions, based purely on race, that Congress never previously sanctioned, and indeed, specifically avoided.

(3) Appellants' interpretation would create an inconsistency within the Statehood Act itself

Section 6(e) of the Statehood Act is a clear indication of the congressional desire to dispose of the management of the entire fishery to the new state.¹⁶ That section primarily provides for the termination of federal authority over the management of the fish and game resources of the State upon the State's establishing its own system. No exception is made for federal retention of authority over native fishing. Certainly if, as appellants urge, Congress desired to re-

¹⁶ The relevant portion of that section reads:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest . . ."

tain control over such a substantial portion of the total fishery, it would have specified that desire in the very section which provides for termination of the function. Indeed, if a major segment of Alaska's fisheries was to be alienated from public control, it became incumbent on Congress to so specify in the clearest of language. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 at 105 (1949). That language is conspicuously absent.

Equally important is the fact that Sec. 6(e) provides that all property previously used by the Federal Government in the conservation and protection of the fish and wildlife of Alaska was to be turned over to the new state. No exceptions were made for property used in the regulation and control of a native fishery. It is hardly reasonable to believe that Congress sought to retain in the Government the authority to regulate nearly one-half of Alaska's fishermen, and at the same time required the Government to dispose of all properties necessary to that work.

A limited interpretation of Sec. 4, as suggested by the appellees, is entirely consistent with the broad termination of federal authority over management in Sec. 6(e). For the special rights preserved in Sec. 4 do not entail a federal management of the fisheries. While Metlakatla will be subsequently discussed, it is important for the sake of example to at least touch on its "rights" presently. Metlakatla had reserved to it under the Statehood Act an area in which only Metlakatlans were permitted to fish. In retaining jurisdiction over that right, the Government's activity will be that of insuring that the area remains exclusive—not of regulation. In the case of aboriginal rights (though none exist here), the Government's

function, by the very nature of aboriginal rights, will be that of insuring that those rights are not interfered with by third parties. These functions do not involve a comprehensive management and conservation program, such as would be necessary were the control of all native fishing reserved, in the Federal Government.

To read Sec. 4, then, as a broad grant of regulatory authority over Indian fishing to the Federal Government is inconsistent with other portions of the Statehood Act itself. It follows that Congress did not intend to retain such broad authority, but instead intended to retain control over certain specified rights—none of which are in issue here.

(4) Appellants' urged interpretation of Sec. 4 would nullify any attempt to adequately conserve Alaska's fisheries

As a last indication of the proper interpretation of Sec. 4, it is important to consider the effect of the interpretation claimed by appellants. While it is not a function of this Court to pass on the wisdom of an Act of Congress, it is at least reasonable to assume in interpreting a congressional act that Congress did not intend an absurd result. *Helvering v. New York Trust Co., Trustee*, 292 U.S. 455, 464-5 (1934); *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

If appellants' contentions are correct, there is a dual sovereignty over fishing in Alaska. The State has full regulatory power over its white citizens, while the Federal Government has full regulatory authority over natives, each to the exclusion of the other. The difficulty with this dual sovereignty is that both natives and whites fish in the same water, at the same time. No one in Alaska is restricted to a particular area for fishing.

The effect of such a dual sovereignty may be clearly seen by hypothesizing a typical regulatory situation. One of the primary functions of salmon conservation is to insure that a required number of fish escape the commercial gear and enter the streams to spawn, insuring the continuation of the resource. To insure this fact, the State imposes closed fishing periods during the runs—periods in which salmon are unobstructed in their attempts to reach their spawning beds. It is obvious that unless all fishermen are bound by such a closure, the conservation attempt will fail. If half the fishermen can fish, it will simply mean that they take twice the fish that they would if other fishermen were not barred—salmon will still be unable to reach the streams. The result of such a halfway measure is that the conservation system becomes completely ineffective. The resource becomes depleted because it cannot be adequately managed.

This is exactly the result that appellants' suggested interpretation implies. If native fishermen are to be free of state regulation, it means that one-half of the State's fishermen are not bound to respect state regulations. The State will be helpless to protect itself from a depletion of its own resource.

This Court has previously had occasion to consider a similar situation of dual sovereignty over fisheries. In *New York ex rel. Kennedy v. Becker*, 241 U.S. 356 (1916), it was proposed that the interpretation of a treaty with the Seneca Indians be that the state would regulate fishing by the whites and the tribe would regulate its members fishing under treaty right on the same land. The Court stated:

"... It is said that the state would regulate the whites and that the Indian tribe would regulate

its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both."

It was held that the tribe was subject to state regulation.

Should this Court adopt the limited interpretation of Sec. 4 suggested by the appellees, Alaska's control of its natural resource is secure. While certain native fishing rights are reserved from state control, they are at least not of the type which would conflict with the state's management duties. Generally, Alaska will be free to regulate its resource for the benefit of all its people.

B. IN THE ABSENCE OF EXPRESS RESERVATION IN THE STATEHOOD ACT, ALASKA FISHERIES REGULATIONS APPLY TO KAKE AND ANGOON AS WELL AS OTHER ALASKANS

Assuming that appellees' construction of Sec. 4 of the Statehood Act is valid, and the regulation of all native fishing was not reserved to the Federal Government, the only question remaining is that of whether through its admission to the Union, Alaska itself gained the power of regulation. There can be little doubt that it did.

It is firmly established that the regulation of fish and game resources is an essential attribute of state power. *Geer v. Conn.*, 161 U.S. 519 (1896); *Lawton v. Steele*, 152 U.S. 133 (1894). The power extends to all citizens of the State, Indian or white, in the absence of valid federal action forbidding such jurisdiction. *Ward v. Race Horse*, 163 U.S. 504 (1895); *United States v. Brooks*, (N.D. Ind. 1940), 32 F. Supp. 422 at

427. Indeed, even if the Federal Government acts to set aside certain fishing rights for Indians, through treaty or congressional act, the State is still free to regulate the exercise of those rights so long as the regulation is not inconsistent with the exercise of the right itself. *Tulee v. State of Washington*, 315 U.S. 681 (1942); *United States v. Winans*, 198 U.S. 371 (1905).

That such broad powers over fisheries management are similarly held by Alaska subsequent to admission is a natural concomitant of the equal footing doctrine. That doctrine prescribes that upon admission to the Union, each state assumes equal sovereign powers with the states which have preceded it. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-9 (1845). While the doctrine is judicial in nature, it is significant that Congress specifically affirmed Alaska's admission "on an equal footing" in Sec. 1 of the Statehood Act.¹⁷ There can be no question, then, that Alaska entered the Union with full sovereign powers, including that of fisheries regulation.

The appellees recognize that the equal footing doctrine is not without certain limitations. In particular, Congress may restrict the scope of state jurisdiction in an act admitting the state to the Union, so long as the restriction is otherwise within the constitutional powers of the Federal Government. *Coyle v. Smith*, 221 U.S. 559 (1911). The restriction's validity does

¹⁷ "[Sec. 1. **Declaration: acceptance, ratification and confirmation of Constitution**] Subject to the provisions of this Act, . . . the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever . . ." Act of July 7, 1958, 72 Stat. 339.

not depend on the act of admission itself, but solely because the power of Congress extends to the subject.

To narrow the issues in controversy, the appellees will assume for purpose of argument that Congress could have, if it desired, withdrawn regulation of all native fishing from state control without violating the equal footing doctrine. An inequality would have been produced in that no other state has had its regulatory authority so drastically withheld, but it would not be the sort of legal inequality contemplated by the equal footing doctrine.

However, regardless of what Congress *could* have done, it did not retain general regulatory authority over natives fishing anywhere in the State. The effect of Sec. 4 has already been noted—its interpretation is narrow, and does not remove general regulatory authority from the State. Nowhere else in the Statehood Act is any reservation of any federal control whatsoever over natives specified. The conclusion follows that the terms of the Statehood Act do not withhold the regulation of native fishermen from the State. Indeed, the congressional affirmation in Sec. 1 that Alaska was to be admitted to the Union on an equal footing with the rest of the states indicates that the effect of the Act was to expressly confer that jurisdictional authority on the State.

This Court has held that in the absence of specific reservation of past federal or tribal control, full regulatory power over Indian fishing passes to the State upon admission. In *Ward v. Race Horse*, 163 U.S. 504 (1895), the Act admitting Wyoming to the Union had made no mention of a previous treaty right held by the Bannock tribes to take game "upon the unoccupied lands of the United States." The Act did state that

Wyoming was to be admitted to the Union "on an equal footing with the original States in all respects whatsoever." 26 Stat. 222 (1890). The absence of an express savings clause, together with the equal footing provision, was held to abrogate the treaty rights. To imply a continuation of those rights, the Court noted, would be to disregard the presumption that Congress intended to admit the State with full governmental authority.

The application and theory of *Race Horse* is of striking clarity here. First, like *Race Horse*, the Alaska Statehood Act did not reserve general regulatory authority over Indian fishing to the Federal Government—only specified regulatory authority over rights which are not in issue here. Second, like the Wyoming Act of Admission, there is an express congressional affirmation that the State of Alaska is to be admitted on an equal footing with other states, if indeed such an express statement was necessary.

The rationale of *Race Horse* becomes even stronger when it is recognized that unlike that case, which involved the preservation or abolition of a solemn treaty right, this case involves no previously created rights whatsoever.

It is not necessary to consider here whether subsequent to the admission of Alaska as a state, Congress could once again assume jurisdiction over native fishing which it had delegated to the State. The question is academic. Congress has taken no action since the adoption of the Statehood Act which could in any way be interpreted to mean that they desired to regulate native fishermen in Alaska. Indeed, the Secretary of the Interior, who is responsible for the regu-

lations authorizing these traps, predicated his action on the White Act, as amended by Sec. 4 of the Statehood Act—not on any subsequent expression of congressional policy (S.R. 85, 104-5, 131-2). If the appellees' interpretation of the Statehood Act is correct, it is quite apparent that the White Act no longer has any application to the general management of Alaska's commercial fisheries and the Secretary's regulations are without legal foundation.

Kake and Angoon, and their occupants, are full Alaskan citizens. As such, they are fully subject to state conservation laws—laws on which not only their, but all Alaska's future depends. In an effort to cease further depletion of the salmon runs, the State has imposed a ban on fish traps. Kake and Angoon cannot be permitted to enrich themselves at the expense of their fellow citizens. Their particular interests must yield before the paramount interest of the State as a whole.

II. THE STATE OF ALASKA HAS FULL JURISDICTION OVER COMMERCIAL FISHING IN THE METLAKATLA RESERVE

Introduction

Most of the previous argument has full application to Metlakatla as well as Kake and Angoon. However, there are certain distinctions between Metlakatla and the other appellants which necessitate separate treatment.

The Metlakatla situation varies from that of Kake and Angoon in several respects. First, it does not involve a federal claim to total jurisdiction over all natives fishing anywhere in Alaska. Rather, the concern is with a particular and unique fisheries reserve

set up by the Government prior to statehood, and the effect of state law upon fishing in that reservation. Metlakatla freely concedes that state fisheries regulations are fully applicable to Metlakatians while fishing outside the confines of the reserve (MEBR 12). Second, the situation differs in that, unlike Kake and Angoon, the exclusive right to fish within the Metlakatlan fisheries reserve can reasonably be termed a "native fishing right" within the meaning of Sec. 4 of the Statehood Act.

But this admission merely forms the question—it does not decide it. For the real issue is the nature of the right preserved to the Metlakatians by Sec. 4 of the Statehood Act. The appellees contend that the right preserved went only to the *area* of reservation, and in no way involved the manner or means of fishery.

A. SECTION 4 OF THE ALASKA STATEHOOD ACT DOES NOT BAR APPLICATION OF STATE LAW PROHIBITING THE OPERATION OF FISH TRAPS TO METLAKATLA

It is clearly within the power of the Federal Government to create Indian reservations within a state or territory which will be free of all local regulatory authority. *Worcester v. Georgia*, 5 Pet. 515; *Williams v. Lee*, 358 U.S. 217 (1959). Furthermore, the Government is free to continue the existence of any such reservation past the time of a state's admission without violating the equal footing doctrine. If Metlakatla is such a reservation, it has a free right to use fish traps, or for that matter any other form of fishing gear free of state regulation.

However, the Federal Government has never been bound to create the same type of reservations for all Indian peoples. The Government is free to create reservations under any terms it deems proper. *Mis-*

souri, Kansas and Texas R'y. Co. v. Roberts, 152 U.S. 114 (1894) (granting rights of way across tribal land); *Buttz v. The Northern Pacific Railroad Co.*, 119 U.S. 55 (1886) (same); Op. Sol. I.D.M. 14237, Dec. 23, 1924 (granting states power to tax); COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, pp. 95-96 (1945). It may grant state jurisdiction over Indians or it may refuse to grant it. E.g. 62 Stat. 1224, 64 Stat. 845, 25 U.S.C., Secs. 232, 233 (1952) (granting civil and criminal jurisdiction to N. Y.); 68 Stat. 795, 18 U.S.C., Sec. 1162 (Supp. 1957) (granting criminal jurisdiction over reservations to certain states). An investigation of Metlakatla's rights, therefore, must proceed initially from a determination of what rights were created by the Federal Government prior to statehood, through creation of the Metlakatla reserve.

The Metlakatlans were originally a branch of the Tsimshian Indian tribe of British Columbia. Some 800 of these Indians emigrated from British Columbia to Annette Island in Southeastern Alaska in 1886 and established the community of Metlakatla. *Alaska Pacific Fisheries v. United States*, 4 Alas. Fed. 709, 711, 248 U.S. 78 at 86 (1918). In 1891, Congress enacted legislation which set aside the body of lands known as the Annette Islands as a reservation for the use of Metlakatlans and such other Alaskan natives as might care to join them. 26 Stat. 1101, 48 U.S.C.A., Sec. 358 (1952). On April 28, 1916, President Wilson issued a proclamation declaring the waters within 3,000 feet of the shore at mean low tide of Annette and adjacent small islands as a reservation for the Metlakatlans and such other Alaska natives as had or might join them, "... to be used under general fisheries laws and regulations ..." (Emphasis supplied.) Presi-

dential Proc. No. 1332, April 28, 1916, 39 Stat. 1777. The validity of the exclusive nature of the reservation was upheld by this court. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Congress, in 1934, affirmed the reservation *under the terms that it then existed*, subject to future modification. Act of May 7, 1934, Ch. 221, Secs. 1-2, 48 Stat. 667 (now covered by 8 U.S.C.A., Sec. 1401 (1952)).

This series of enactments creates the total substance of Metlakatla's rights. The Metlakatlans were granted an area in which they alone could fish. But the right was limited by the specific federal directive that all fishing done within the area was to be under general fisheries regulation.

It is not surprising that the Metlakatlan reservation, unlike the vast majority of federal Indian reservations, was fully subject to the uniform scheme of fisheries regulation. First, the fishery in which the Metlakatlans engage is commercial. Where a subsistence fishery is preserved by creation of a reservation, the needs of the population provide a natural limitation on the use of the resource, and no governmental control is necessary. But where commercial fisheries are concerned, the natural desire of people to make as much money as possible often precludes a self-imposed conservation policy, and artificial controls are necessary. Second, if Metlakatlans were allowed to fish on their reservation without regard to conservation they would not only be hurting themselves, but substantial numbers of fishermen outside of the reservation. The salmon taken in Metlakatla's reserve are, for the most part, not Metlakatlan salmon. They are salmon spawned in streams outside the reserve, protected by money from state funds paid by all

citizens, who now seek to return to their original streams to spawn. In doing so, they pass through the Metlakatlan reserve.

In realization of these facts, it is entirely realistic that the Federal Government insisted that the exclusive fishing reserve be only exclusive as to trespass, and not free of general fisheries regulation. For a conservation program to succeed, all must be equally bound or the entire program may fail. *Missouri v. Holland*, 252 U.S. 416 (1920).

During the entire history of the reserve's existence, the fishing within it, while undertaken exclusively by Metlakatlans, has been under the same regulatory scheme as the entire fishery. No exceptions have been made. The Metlakatlans had no greater rights to fish in unique manner, and in particular to use traps, than did other Alaskans.

Assuming then that Sec. 4 of the Statehood Act did operate to divest the State of control over any fishing right possessed by the Metlakatlans, what did that divestiture entail? Since the only right possessed by the Metlakatlans was that of forbidding other fishermen to enter their reserve, it appears that Sec. 4 preserved that right. The State, therefore, is not free to authorize entry into the reservation. But the State, like the Federal Government before it, does have the right to prescribe the *means* by which fish may be taken within the reservation. The Metlakatlans possessed no right prior to statehood to be free of regulation, and they cannot claim to have had a non-existent right preserved.

While this Court has never been presented with a situation completely similar to this, it has had occasion

to pass on certain analogous situations. When a right of fishery has been reserved to Indians at a specified place, the Court has uniformly held that in the absence of specific federal protection, the right was subject to valid state regulation. In *Tulee v. Washington*, 315 U.S. 681 (1942) the Court considered the effect of a treaty provision reserving to Indians the right to take fish "at all usual and accustomed places in common with the citizens" of Washington. The Court held that the treaty left with the state "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing . . ." Similarly, in *United States v. Winans*, 198 U.S. 371, the Court recognized the right of the state to validly regulate those treaty rights which had not, by federal action, been excluded from their control. In *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916), in considering a fishing right granted by treaty, it was held:

" . . . [T]he clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised. . . ." *Id.* at 563-4.

It is true that all of the above cited cases dealt with Indians fishing outside of the confines of a reservation. But the location itself is not crucial *unless the Federal Government makes it so*. In the case of Metlakatla, Congress only granted to Metlakatla the right to exclusive use of their area. The Government never granted to the Metlakatlans a freedom from regula-

tion. The extent of Metlakatla's right, then, is similar to a treaty right which grants Indians the right to take fish in a particular place ("at all accustomed places" is the usual terminology). But this analogous right is subject to state regulation, and so is that of Metlakatla.

The nature of the Metlakatlan "reservation" cannot be too strongly emphasized. It is not, and has never been treated as what is normally termed an Indian reservation. Residents of the Annette Island Community are a mixed group composed of descendants of the Tsimshian Indians, Aleuts and Eskimos. There is no tribal organization. Residents are trained technicians to a large extent—many servicing the airport, which is one of the most important in Southeastern Alaska (Op. 60). The fisheries fleet is not restricted to taking salmon in the "reserve" but extends to all Southeast Alaskan waters, and other fisheries than salmon (Op. 60). Schools within the area are furnished by the State (Op. 60). The residents have always paid state income taxes, school taxes, gasoline taxes, and generally all forms of state taxes paid by other residents of Alaska (App. B). Prosecution for crimes is handled in all respects as though there was no reservation. *United States v. Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958). When the area has been economically depressed, state funds have been allocated to it as they have to other communities similarly situated. (App. C.)

The Alaska Supreme Court in full recognition of the complete fusion of Metlakatla into the Alaskan community as a whole, held that the reservation did not survive the admission of Alaska into the Union. It is not necessary to draw such a forceful conclusion.

It is only necessary to fully recognize the status of the "reservation" before statehood and apply relevant legal theory—not theories which may be applicable to Indian reservations elsewhere, set up under different terms, and given different historical treatment. It was the Federal Government's prerogative to set up the Metlakatla fishing reserve as it saw fit. The decision of the federal authorities was to have the fishing within the reserve regulated under a uniform system of regulation—not to grant the Metlakatlans any rights to fish in a particular *manner* and at a particular time. It would be in complete disregard of this clearly established congressional policy to hold that in Sec. 4 of the Statehood Act, Congress meant to relegate Metlakatla to the status of an aboriginal Indian reservation. If rights were preserved by that section, the only right, consistent with congressional policy, can be that of refusing entrance to nonresidents of the community. But the Metlakatlans' fishing is subject to state law, and that law forbids the use of traps.

B. THE STATE'S REGULATION OF FISHING WITHIN THE MET-LAKATLA RESERVE DOES NOT CONFLICT WITH THE SUPREMACY CLAUSE

- (1) **State regulation of fishing in the Metlakatla reserve has not been preempted by federal legislation**

Appellant urges this Court to hold that state regulation of fishing on the Metlakatlan reserve is void under the doctrine of preemption (MEBR 34). In support of this contention, Metlakatla suggests that an irreconcilable conflict has arisen between two sovereigns—the State forbidding traps, and the Secretary permitting them. As a result of this "conflict," state power must yield to federal authority.

The fallacy in this argument is that the will of the Secretary does not constitute the will of the Govern-

ment. The Secretary has not based the regulations on his own desires, but on what he believes to be the will of Congress as expressed in Sec. 4 of the Statehood Act. If Sec. 4, as suggested by appellees, did not reserve jurisdiction over the entire fishing process of the Metlakatians to the Federal Government, but instead only reserved jurisdiction to keep the water area exclusive, it follows that the Secretary's interpretation is invalid and no question of preemption arises. There must be a clear and unequivocal expression of congressional will by Congress if state powers are to be preempted. *Cohens v. Virginia*, 6 Wheat 264, 443; *Reid v. Colorado*, 187 U.S. 137, 148 (1902). Here, there is no expression of congressional will which in any way conflicts with state law. In the absence of a clear conflict, state law must prevail.

(2) State regulation in the Metlakatla reserve does not constitute interference with a federal instrumentality

As a corollary to its argument of federal preemption, Metlakatla claims complete immunity from state fishing regulations on the grounds that such regulations constitute interference with a federal instrumentality. In support of its claim of broad immunity, appellant cites *Alaska v. Annette Island Packing Co.*, 289 Fed. 671 (9th Cir. 1923), holding that Territorial occupation taxes could not be imposed upon a private cannery operating within the confines of the reserve (MEBR 35). The case never reached this court, and its holding appears to have been expressly repudiated in *Oklahoma Tax Comm'n v. Texas Co.*, 436 U.S. 342 (1949).

Appellees do not question the principle that a state is forbidden to interfere with the operation of a fed-

eral instrumentality. However, the immunity extends only so far as is necessary to protect the federal function. *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). Assuming that the federal purpose in establishing the Metlakatla reserve was to aid the Metlakatlans in becoming self-sufficient, the Government selected a particular means to accomplish this result. It set aside for the community a section of Alaskan waters in which they alone could fish—a valuable contribution to the economy of the community. However, the Government did not go so far as to free the Metlakatlans from fishing regulations applicable to all of Alaska. The Metlakatlan economy has always been subject to “interference” from fishing restriction, under the obvious theory that regulation for conservation is not interference at all, but is directed at improving the economy in the long run. When the Alaskan fishing season was closed, Metlakatla was similarly forbidden to fish. When the number of fish traps in the State were curtailed, Metlakatla’s traps were similarly reduced. It is difficult to understand how state regulation of fishing within the water reservation interferes with federal policy, if it has always *been* federal policy to regulate the reserve under general fisheries regulations. Regulation of the means of fishing is entirely consistent with the growth and development of the federal instrumentality, much as it is consistent with the development with the entire fishing effort in the State.

The real basis of Metlakatla’s argument of interference with a federal instrumentality seems to be that if fish traps are abolished, the community will be faced with an economic adjustment due to the

decreased number of fish available for their cannery. The Alaska Supreme Court both challenged the Metlakatla claim and minimized its impact:

“Appellants have pointed out that sizeable balances remain unpaid on government loans which financed the purchase of traps, canneries, boats and related gear. They also argue that the loss of trap fishing privileges will seriously affect their economy. It appears from the record that there is a sufficient number of independent seine boats in Southeastern Alaska to supply appellants' canneries. If not, the vacuum will undoubtedly be filled within a very short time. We are not convinced that the over-all economy of appellant communities will suffer. On the contrary, there is every reason to believe that the economy of the individual fisherman will be improved. Financial adjustments on loan repayments may be necessary. Adjustment has already taken place in the salmon industry generally. Private enterprise has been required to make radical financial and physical adjustments patterned as nearly as possible to the state's flexible plan for the conservation and rebuilding of the salmon resource.” (Op., 62-63.)

While federal policy may strive to place native wards on a substantially equal basis with their fellow citizens, federal policy has never sought to create super-citizens out of natives. All Alaskans, native and white, have had to adjust to the fact that the future needs of the State require that the present drain on the salmon resource be curtailed. It would be a distortion of the aims of federal native policy, particularly in Alaska, for one community of natives to be free to reap the benefits of the deprivation of all other citizens. Metlakatla, as an Alaskan community, must share the

duties as well as the benefits of state law. Temporary inconveniences must be subordinated to a policy dedicated to preventing exploitation to annihilation of Alaska's greatest resource.

CONCLUSION

For the foregoing reasons, it is submitted that the judgments below should be affirmed.

Respectfully submitted,

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APPENDIX A**Statutes Involved****1. ALASKA STATEHOOD ACT, Sec. 1, 72 Stat. 339:**

"[Sec. 1. Declaration; acceptance, ratification and confirmation of Constitution] Subject to the provisions of this Act, . . . the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, . . ."

2. ALASKA STATEHOOD ACT, Sec. 4, 72 Stat. 339:

"As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be con-

strued as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation."

3. ALASKA STATEHOOD ACT, Sec. 6(e), 72 Stat. 340-341:

"(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: *Provided*, That the administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and

conservation of said resources in the broad national interest . . .”

4. ALASKA OMNIBUS ACT, Sec. 2, 73 Stat. 141:

“(a) Section 4 of the Act of July 7, 1958 (72 Stat. 339), providing for the admission of the State of Alaska into the Union, is amended by striking out the words ‘all such lands or other property, belonging to the United States or which may belong to said natives’, and inserting in lieu thereof the words ‘all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives’.

“(b) Section 6(e) of said Act is amended by striking out the word ‘legislative’ and inserting in lieu thereof the word ‘calendar’.”

5. WHITE ACT, Sec. 1, 43 Stat. 464, amended 44 Stat. 752, 48 U.S.C., sec. 221:

“Section 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited

therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . .”

6. TREATY OF CESSION, Art. VI, 15 Stat. 539:

“In consideration of the cession aforesaid the United States agree to pay at the treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. **The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.**”

7. PRESIDENTIAL PROCLAMATION No. 1332, April 28, 1916,
39 Stat. 1777:

....

"**WHEREAS** the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

"**WHEREAS** it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

"**Now**, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

8. Act of May 7, 1934, Sec. 3(c), 48 Stat. 667:

"The granting of citizenship to the Indians described in Section 3(b) of this title shall not in any manner affect the rights, individual or collective, of the said Indians to any property, nor shall it affect the rights of the United States Government to supervise and administer the affairs of the said Metlakatla Colony. And any reservations heretofore made by any Act of Congress or Executive order or proclamation for the benefit of the said Indians shall continue in full force and effect and shall continue to be subject to the modification, alteration, or repeal by the Congress or the President, respectively."

9. SESSION LAWS OF ALASKA 1959, Ch. 17, Sec. 1, as amended by SESSION LAWS OF ALASKA 1959, Ch. 95:

"Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or waters owned or hereafter acquired by the State of Alaska. Nothing in this section shall prevent the maintenance, use or operation of small, hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally maintained and operated in or above the mouth of any stream or river in Alaska."

10. SESSION LAWS OF ALASKA 1959, Ch. 95, Sec. 1:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers

of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives."

11. C.F.R., Tit. 25, Ch. 1(H), Part 88.2 (Supp. 1961):

"§ 88.2 *Restrictions on Indian fish traps.*

"(a) Subject to the limitations of paragraph (c) of this section, not more than twenty-one salmon fish traps may be, but are not required to be, utilized for the purpose of salmon trap fishing by Indian villages. Such fish trap operations, if the natives elect to engage in them, shall be conducted as heretofore only at sites hereinafter described, and within the fishing districts and fishing sections defined in the 1960 edition of the Regulations of the Alaska Board of Fish and Game for Commercial Fishing in Alaska.

"(b) Angoon Community Association: Salmon trap fishing is permitted, but not required, at the following sites within the southern section of the western district when any salmon purse seine fishing is permitted by the State of Alaska in the southern section of the western district:

"(1) Chicago Island at 57°36'16" north latitude, 134°51'34" west longitude.

"(2) Admiralty Island at 57°22'28" north latitude, 134°34'18" west longitude.

"(3) Killisnoo Island at 57°28'15" north latitude, 134°36'35" west longitude.

"(4) Admiralty Island at 57°13'52" north latitude, 134°39'05" west longitude.

"(c) Organized Village of Kake: Salmon trap fishing is permitted but not required, at the following sites within the General Section of the eastern district when any salmon purse seine fishing is permitted by the State of Alaska in the General Section of the eastern district:

"(1) Stephens Passage at 57°21'20" north latitude, 133°27'02" west longitude.

"(2) Frederick Sound at 57°11'27" north latitude, 133°34'02" west longitude.

"(3) Frederick Sound at 57°10'52" north latitude, 133°32'44" west longitude.

"(4) Admiralty Island at 57°18'40" north latitude, 133°57'21" west longitude.

"(5) Admiralty Island at 57°10'29" north latitude, 134°12'53" west longitude.

"(6) Herring Bay at 57°07'21" north latitude, 134°19'45" west longitude.

"(7) Admiralty Island at 57°04'02" north latitude, 134°25'20" west longitude.

"(8) Kupreanof Island at 57°01'23" north latitude, 134°02'50" west longitude.

"(9) Kuiu Island at 56°55'52" north latitude, 134°16'08" west longitude.

"(d) Metlakatla Indian Community (Annette Island Fishery Reserve): Salmon trap fishing is permitted, but not required, at the following sites within the southeast section of the Clarence Strait District

from the opening date set by the State of Alaska, for any salmon purse seine fishing in the General Section of the southern district to the closing date set by the State for any salmon purse seine fishing in the southeast section of the Clarence Strait District, or one week following the closing date set by the State for any salmon purse seine fishing in the General Section of the southern district, whichever date is later:

“(1) Annette Island at $55^{\circ}15'09''$ north latitude, $131^{\circ}36'00''$ west longitude.

“(2) Annette Island at $55^{\circ}12'52''$ north latitude, $131^{\circ}36'10''$ west longitude.

“(3) Annette Island at $55^{\circ}02'47''$ north latitude, $131^{\circ}38'53''$ west longitude.

“(4) Annette Island at $55^{\circ}05'41''$ north latitude, $131^{\circ}36'39''$ west longitude.

“(5) Annette Island at $55^{\circ}01'54''$ north latitude, $131^{\circ}38'36''$ west longitude.

“(6) Annette Island at $55^{\circ}00'45''$ north latitude, $131^{\circ}38'30''$ west longitude.

“(7) Annette Island at $54^{\circ}59'41''$ north latitude, $131^{\circ}36'48''$ west longitude.

“(8) Ham Island at $55^{\circ}10'13''$ north latitude, $131^{\circ}19'31''$ west longitude.

“(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, and if the villages elect to operate any fish traps, the villages may operate traps only at the following sites: Angoon: (1), (2), and (4); Kake: (3), (4), (8), and (9); Metlakatla: (2), (3), (4), and (6).”

APPENDIX B**DEPARTMENT OF REVENUE
STATE OF ALASKA
JUNEAU**

November 27, 1961

The Honorable Ralph Moody
Attorney General
P. O. Box 2170
Juneau, Alaska

Attention Avrum Gross
Assistant Attorney General

Dear Mr. Moody:

Re Metlakatla Community Taxes

In reply to your inquiry regarding the liabilities of the citizens of the Metlakatla Community for State taxes, the Department of Revenue treats them the same as any other individual citizen in Alaska. They are subject to the individual income tax, school tax and inheritance tax. If they are engaged in business, even though the place of business is located within the Metlakatla Community limits, they are liable for business license and gross receipts tax. If they have coin operated devices in their place of business, they become liable for the amusement and/or gaming device tax. They are required to purchase motor vehicle licenses and motor vehicle drivers licenses and to pay motor fuel tax like any other citizen.

Historically, they have been treated like all other citizens in Alaska and are subject to all State tax laws without any exceptions.

Sincerely yours,

/s/ PETER GATZ
Peter Gatz
Commissioner

APPENDIX C

STATE DEPRESSED AREA FUNDS ALLOCATED
TO APPELLANTS

To: Governor William A. Egan
 From: Robert E. Hoffman
 Director of Rural Development
 Subject: Governor's Work Projects
 for Depressed Areas

| Community | November 16, 1960 | | |
|----------------|-----------------------|------------------------|------------------------|
| | (\$50,000) 1958-59 | (\$200,000) 1959-60 | (\$155,000) 1960-61 |
| Angoon | \$ 8,000 | \$10,000 | \$ 8,000 |
| Craig | 8,075 | 10,000 | 8,000 |
| Hydaburg | 8,050 | | 10,000 |
| Hoonah | 8,000 | 10,000 | |
| Klawock | 8,075 | 10,000 | 8,000 |
| Kake | 8,000 | 10,000 | 8,000 |
| Yakutat | 2,300 | | 3,500 |
| Haines | | 10,000 | |
| Klukwan | | 5,000 | |
| Saxman | | 8,000 | 4,000 |
| Wales | | 3,000 | |
| Wainwright | | | 3,000 |
| Kotzebue | | 7,500 | |
| Elim | | 3,000 | |
| Kaltag | | 3,000 | |
| Koyuk | | 3,000 | |
| Teller | | 3,000 | |
| Cordova | | 10,000 | |
| Valdez | | 10,000 | |
| Kodiak | | 10,000 | |
| Tyonek | | 6,000 | |
| Teller Mission | | 3,000 | |
| White Mountain | | 3,000 | |
| Holy Cross | | 3,000 | |
| Unalaska | | 2,500 | |
| Fort Yukon | | 3,000 | |
| Fortuna Ledge | | 2,500 | |
| Nightmute | | 2,500 | |

APPENDIX D

SOUTHEASTERN ALASKA CATCH BY GEAR
1951-1961 in Number of Fish

62

| Community | (\$50,000) 1958-59 | (\$200,000) 1959-60 | (\$155,000) 1960-61 |
|------------|-----------------------|------------------------|------------------------|
| Chefornak | | 2,500 | |
| Kipnuk | | 2,500 | |
| Eek | | 2,500 | |
| Bethel | | 7,500 | |
| Unalakleet | | 7,500 | |
| Eagle | | 3,000 | |
| Hooper Bay | | 5,000 | |
| Shaktoolik | | | 2,000 |
| Metlakatla | | | 8,000 |
| Wrangell | | | 6,000 |

CATCH SUMMARY

| All Gear | # of Units | Kings | Reds | Cohos | Pinks | Chums |
|----------|---------------|---------|-----------|-----------|------------|-----------|
| 1951 | | 474,350 | 819,621 | 3,310,226 | 22,220,113 | 4,123,010 |
| 1952 | | 528,407 | 919,316 | 1,743,753 | 9,802,657 | 4,178,549 |
| 1953 | | 498,345 | 1,376,454 | 1,163,581 | 4,981,409 | 3,541,901 |
| 1954 | | 397,620 | 1,220,157 | 1,770,807 | 8,909,481 | 4,243,671 |
| 1955 | | 373,552 | 747,330 | 1,338,477 | 9,333,972 | 1,528,202 |
| 1956 | | 239,148 | 920,778 | 916,542 | 13,728,271 | 2,701,261 |
| 1957 | | 300,046 | 1,071,257 | 1,218,479 | 6,857,895 | 3,413,051 |
| 1958 | | 325,154 | 1,006,235 | 955,349 | 9,837,907 | 2,787,025 |
| 1959 | | 364,740 | 800,638 | 1,024,390 | 7,851,298 | 1,291,409 |
| 1960 | | 309,989 | 588,288 | 720,808 | 2,985,021 | 1,019,152 |
| *1961 | | 228,262 | 744,537 | 884,455 | 12,635,909 | 2,558,451 |

CATCH BY GEAR

| Trap | # of Units | Kings | Reds | Cohos | Pinks | Chums |
|-------|---------------|-------|---------|---------|------------|-----------|
| 1951 | 252 | 1,029 | 278,359 | 821,696 | 14,794,634 | 1,622,396 |
| 1952 | 265 | 583 | 297,304 | 344,941 | 5,316,827 | 1,329,138 |
| 1953 | 256 | 1,960 | 563,666 | 268,321 | 2,621,746 | 907,072 |
| 1954 | 118 | 1,450 | 325,017 | 193,735 | 4,619,918 | 781,069 |
| 1955 | 113 | 1,344 | 198,725 | 166,991 | 4,080,050 | 343,344 |
| 1956 | 122 | 5,775 | 295,773 | 148,941 | 6,153,690 | 571,276 |
| 1957 | 123 | 2,363 | 310,952 | 132,938 | 2,179,618 | 620,938 |
| 1958 | 146 | 2,204 | 394,954 | 170,098 | 5,343,907 | 800,506 |
| 1959 | 11 | 17 | 18,460 | 7,887 | 384,404 | 17,576 |
| 1960 | 11 | 48 | 13,146 | 3,723 | 156,442 | 14,415 |
| *1961 | 11 | 27 | 19,906 | 9,373 | 951,750 | 42,420 |

Purse Seine

| | | | | | | |
|-------|-----|-------|---------|---------|------------|-----------|
| 1951 | 462 | 1,751 | 144,498 | 228,450 | 7,061,833 | 2,423,416 |
| 1952 | 549 | 1,625 | 277,512 | 125,477 | 4,335,543 | 2,695,388 |
| 1953 | 457 | 4,921 | 402,034 | 146,493 | 2,289,907 | 2,375,347 |
| 1954 | 389 | 9,449 | 427,668 | 107,923 | 4,010,928 | 3,129,072 |
| 1955 | 636 | 9,872 | 228,377 | 91,346 | 5,087,740 | 997,981 |
| 1956 | 437 | 4,701 | 348,784 | 124,825 | 7,422,036 | 1,930,352 |
| 1957 | 450 | 3,975 | 456,155 | 124,611 | 4,592,725 | 2,107,892 |
| 1958 | 505 | 5,336 | 337,996 | 112,575 | 4,214,872 | 1,604,947 |
| 1959 | 482 | 4,549 | 542,140 | 185,046 | 7,208,811 | 891,609 |
| 1960 | 512 | 6,799 | 378,740 | 133,096 | 2,726,298 | 777,681 |
| *1961 | 500 | 5,791 | 433,045 | 257,115 | 11,236,754 | 2,212,446 |

Beach Seine

| | | | | | | |
|------|----|---|-------|-------|--------|--------|
| 1951 | 23 | | 100 | 3,627 | 32,004 | 4,868 |
| 1952 | 31 | | 153 | 2,708 | 9,894 | 14,869 |
| 1953 | 29 | | 1,267 | 1,840 | 3,331 | 35,757 |
| 1954 | 35 | | 374 | 2,113 | 23,360 | 32,257 |
| 1955 | 34 | 2 | 204 | 1,145 | 11,255 | 7,311 |
| 1956 | 18 | | 56 | 880 | 10,598 | 7,985 |
| 1957 | 10 | | 1,387 | 577 | 1,140 | 12,431 |
| 1958 | 17 | | 283 | 462 | 2,456 | 8,675 |

*All 1961 figures are preliminary.
1961 Units of gear estimated

Source: ALASKA DEPARTMENT OF FISH AND GAME

SOUTHEASTERN ALASKA CATCH BY GEAR **1951-1961 in Number of Fish**

| Gill Nets | # of Units | Kings | Reds | Cohos | Pinks | Chums |
|-----------|---------------|---------|---------|-----------|---------|---------|
| 1951 | 598 | 20,400 | 394,700 | 254,100 | 163,762 | 48,386 |
| 1952 | 944 | 79,323 | 343,913 | 287,018 | 106,227 | 135,039 |
| 1953 | 1336 | 29,812 | 408,777 | 259,143 | 44,132 | 216,577 |
| 1954 | 1113 | 42,613 | 465,157 | 417,591 | 152,058 | 293,786 |
| 1955 | 1016 | 36,374 | 319,266 | 329,561 | 97,660 | 176,636 |
| 1956 | 1142 | 31,220 | 275,897 | 233,689 | 63,745 | 185,720 |
| 1957 | 785 | 24,375 | 301,279 | 165,644 | 40,026 | 661,829 |
| 1958 | 935 | 31,699 | 274,758 | 197,890 | 226,264 | 373,028 |
| 1959 | 759 | 41,686 | 329,877 | 264,291 | 202,769 | 380,926 |
| 1960 | 673 | 20,464 | 195,464 | 187,787 | 76,729 | 224,607 |
| *1961 | 625 | 19,444 | 291,286 | 222,967 | 428,405 | 300,885 |
| Troll | Units | | | | | |
| 1951 | 1903 | 451,180 | 1,964 | 2,002,653 | 167,890 | 23,944 |
| 1952 | 1965 | 446,876 | 434 | 983,609 | 34,166 | 4,115 |
| 1953 | 1084 | 462,652 | 710 | 487,784 | 22,293 | 7,148 |
| 1954 | 1097 | 344,108 | 1,941 | 1,049,445 | 103,217 | 7,487 |
| 1955 | 1727 | 325,900 | 758 | 749,434 | 57,267 | 2,930 |
| 1956 | 1396 | 197,452 | 268 | 408,207 | 78,202 | 3,928 |
| 1957 | 1976 | 289,333 | 1,484 | 794,709 | 44,386 | 9,940 |
| 1958 | 2721 | 285,921 | 244 | 474,324 | 50,408 | 2,869 |
| 1959 | 2013 | 319,498 | 161 | 567,166 | 55,344 | 1,298 |
| 1960 | 1508 | 282,678 | 938 | 396,202 | 25,552 | 2,449 |
| *1961 | 1500 | 203,000 | 1,300 | 395,000 | 19,000 | 2,700 |

*All 1961 figures are preliminary.

1961 Units of gear estimated

Source: ALASKA DEPARTMENT OF FISH AND GAME

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 2

ORGANIZED VILLAGE OF KAKE AND ANGOON
COMMUNITY ASSOCIATION,

Appellants,

WILLIAM A. BELL, GOVERNOR OF ALASKA,

Appellee.

ON PETITION FOR WRIT OF HABEAS CORPUS BY THE GOVERNOR OF ALASKA

VS. WILLIAM A. BELL, GOVERNOR OF ALASKA, AND ANGOON COMMUNITY ASSOCIATION

JOHN W. CHARTER,

NEW YORK, N. Y.

Attorney for Appellants

JOHN W. CHARTER,

Kake and Angoon.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 3

ORGANIZED VILLAGE OF KAKE, AND ANGOON
COMMUNITY ASSOCIATION,

v.

Appellants,

WILLIAM A. EGAN, GOVERNOR OF ALASKA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

**BRIEF FOR APPELLANTS IN NO. 3, ORGANIZED
VILLAGE OF KAKE, AND ANGOON COMMUNITY
ASSOCIATION**

Opinions Below

The opinion of the court below rendered June 2, 1961, is reported in 362 P. 2d 901, and printed as an Appendix to the Statement as to Jurisdiction filed herein. The opinion of this Court based on a previous appeal from the judgment of the District Court for the District of Alaska in Juneau acting as a transitional state court, directing appellants to proceed with their appeal to the Supreme Court of Alaska for clarification of certain issues, is reported in 363 U. S. 555. The opinion of Mr. Justice Brennan, as Circuit Justice,

upon a temporary restraining order pending the previous appeal, is reported in 80 S. Ct. 33 and 4 L. ed. 2d 34. The opinion of Kelly, J. of the District Court for the District of Alaska appears in the printed record (R. 58-66) and is reported in 174 F. Supp. 500. Supplemental findings of fact appear at pp. 67-69 of the printed record.¹

Jurisdiction

Jurisdiction of this Court is invoked under § 1257 of the Judicial Code, sub pars. (1), (2). The Supreme Court of the State of Alaska handed down its opinion on June 2, 1961 (Appendix to Statement as to Jurisdiction),² affirming the judgment of the District Court for the District of Alaska pursuant to which the complaints of these appellants in No. 3 were to be dismissed. R. 58-66. Written notice of appeal was filed by these appellants July 26, 1961. Statement as to Jurisdiction was filed September 25, 1961. Appellee waived its right to file a motion to dismiss or affirm, and by order of October 23, 1961, this Court noted probable jurisdiction.

The issues in this case were first brought to the attention of this Court by an earlier appeal of appellants herein from the decision of the District Court for the District of Alaska which was then the highest court of the State of Alaska in which a decision could be had. 363 U. S. p. 560. Pending this earlier appeal appellants sought and obtained on July 11, 1959, through Mr. Justice Brennan, acting as Circuit

¹ The printed record consists of the Transcript of Record (R.), and Supplemental Transcript of Record (S.R.) in Dockets 326-327, O.T. 1959 (now Dockets 2 and 3, O.T. 1961), which served the Supreme Court of Alaska as the record in this case and has been designated as the major part of the record on appeal. The parties have been excused by this Court from printing the balance of the record on appeal, which consists mainly of the opinion of the Supreme Court of Alaska.

² Hereinafter designated "Opinion".

Justice, a stay of execution. Thereafter this Court in its opinion of June 20, 1960, stated that "the appeals are within our jurisdiction under 28 U. S. C. § 1257(2), since the court below sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution." 363 U. S. at p. 557.³ Appeals had been taken from the decision of the District Court to the newly organized Supreme Court of the State of Alaska; and this Court directed that the appeals be prosecuted to obtain from that (the new Supreme) court enlightenment on "antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State." 363 U. S. p. 561. The Court continued the stay of execution pending final determination of the issues.

Now that the Supreme Court of Alaska has had an opportunity to pass upon the issues and interpret local laws, this Court has before it the appeal from the decision of the Supreme Court of Alaska as well as the appeal from the decision of the transitional District Court for determination on the merits.

Constitutional Provisions, Treaties, Statutes, etc.

The following are quoted in our earlier red Appendix:

Treaty with Russia, Mar. 30, 1867, 15 Stat. 539, 542, Art III.—red App. 1-2.

R. S. § 1839, from Revised Statutes, Provisions Common to All the Territories, 1874.—red App. 2.

Alaska Civil Government Act of May 17, 1884, 23 Stat. 24, 26, § 8, proviso.—red App. 2-3.

³ At p. 557 of the decision, this statement was made conditional upon the District Court's having been "the highest court of a State in which a decision could be had" at the time of the appeal. At p. 590 of the decision, the Court stated that this condition had been met.

Alaska Statehood Act of July 7, 1958, 72 Stat. 339, Pub. L. 85-508, §§ 1, 4, 6(e), 7, 8(a), (b), (c) and (d), 12, 13, 14, 15, 16, 17, 18.—red App. 4-14.

Alaska Omnibus Act of June 25, 1959, 73 Stat. 141, Pub. L. 86-70, § 2(a), (b).—red. App. 14-15.

White Act of June 6, 1924, 43 Stat. 464, as amended, from 48 U. S. C. §§ 221, 222, 226, 227, 228.—red App. 15-17.

Constitution of Alaska as ratified by electorate of Alaska April 24, 1956, and effective under the Statehood Act on January 3, 1959: Art. IV, Secs. 1, 2, 3; Art. VIII, Sec. 15; Art. XII, Secs. 12, 13; Art. XV, Secs. 2, 4, 17, 24, 25; Ordinance No. 3.—red App. 17-21.

Session Laws of Alaska 1959, Chap. 17, red App. 22-23; Chap. 95, red App. 26-27.

Proclamations of the President: Jan. 3, 1959, admitting Alaska, 24 Fed. Reg. 81, red App. 29-30.

Press Release, Secty. Interior Seaton, April 7, 1960, and proposed regulations to govern Indian Fishing in Alaska, April 9, 1960, 25 Fed. Reg. 3079, red App. 32-38.

Statement of Fish and Wildlife Service of all fish traps, Indian and non-Indian, operated in Alaska for last five years, dated April 13, 1960, red App. 39.

The following additional matters are quoted in our Appendix to this brief:

Sec. 1505 Judicial Code, 28 U. S. C. § 1505.

Delegation of authority for enforcement of regulations governing Indian fishing in Alaska, Fed. Reg. July 25, 1961, and August 5, 1961, 26 Fed. Reg. 6628, 7064.

Letter of November 3, 1961, Hildegard Thompson, Acting Asst. Commissioner, Bureau of Indian Affairs.

Statement of the Case

The appeal to the Supreme Court of Alaska has in no way changed the facts stated in the complaints and admitted in the motion to dismiss as they were reiterated in the brief filed in the original appeal on April 20, 1960, as follows:

Appellants, Village of Kake and Angoon Community Association, are each an Indian corporation chartered pursuant to the Indian Reorganization Act of 1934 [48 Stat. 984, 988, as amended 49 Stat. 1250, § 17; 25 U. S. C. § 477]; and each has as its membership an entire village of Thlinget Indians. The village of Kake is located at Kake, Alaska,⁴ and that of Angoon is located at Angoon, Alaska.⁵ S. R. 82-83, 102.

Each appellant operates fish traps, boats, canneries and related equipment which was purchased by the United States in trust for appellants as beneficial owners (S. R. 83, 102-103), although each appellant owes a sizeable debt to the United States arising out of the acquisition and operation of this equipment (S.R. 88, 108). The United States furnishes the funds for operating this equipment (S.R. 84, 103), the operation of which, at the present time and historically, is the only employment available to the members and constitutes the sole source of income for the calendar year for almost all of the members (S.R. 89, 108).

Operation of the traps is essential to the operation of the canneries; appellants do not have available to them an alternative method of maintaining their operations. Closing the canneries would wipe out the economic base of the members, leaving the villages with no means of self-support, the

⁴ Kake is located on the northwest side of Kupreanof Island approximately 100 miles southwest of Juneau.

⁵ Angoon is located on the southwest side of Admiralty Island, approximately 60 miles southwest of Juneau.

resulting damage extending to the very fiber of their social, economic and cultural well being. S.R. 88-89; 108.

Although the regulations (24 F.R. 2053) of the Secretary of the Interior of March 7, 1959, prohibited fish traps generally, the prohibition was not applied to native fish traps and some traps of each of the appellants were designated for operation. S.R. 84-85, 104. The Secretary of the Interior based this distinction in treatment of Indian and non-Indian traps on the disclaimer of Indian fishing rights made by the State of Alaska, and on the long-standing supervisory control exercised by the United States for the protection of the Indians. S.R. 85, 104-105.*

Notwithstanding appellants were thus authorized to operate, appellee (Governor Egan) both personally and by his agents threatened appellants with seizure of their traps and criminal prosecution of the persons installing and maintaining them, and, on June 15, 1959, actually seized a trap which Kake had set out and arrested the President of Kake's Council and the foreman of the crew which set the trap. S.R. 86, 105-106.

The complaints charged, among other things, that sec. 4 of the Statehood Act and Art. XII, Sec. 12, of the Constitution of Alaska prevented the State from interfering with the control and management of Indian fishing rights held by the Indians or the United States as trustee on their behalf; that the regulations allowing appellants to operate constituted an exercise by the United States of its exclusive powers over the fishing rights of Indians; that the regulation of Indians was exclusively in the United States; and that the state statutes (Constitutional Ordinance No. 3 and Chap. 17, Sess. L. Alaska 1959) were repugnant to the statutes and Constitution of the United States and of Alaska.

* See letter to Alaska Area Director set out at length at S.R. 131-132. The disclaimer of Alaska cited by the Secretary of the Interior is Sec. 4 of the Statehood Act, quoted in our red Appendix p. 5.

S.R. 87-88; 106-107. A preliminary and a permanent injunction were prayed. S.R. 91-92; 110-111.

To these complaints appellee immediately moved to dismiss (S.R. 120, 122), asserting exclusive state jurisdiction over the lands and waters involved, that the state has authority to prohibit fish traps for commercial fishing; that the Constitution of Alaska has amended the White Act (of 1924), 48 U.S.C. § 221 et seq. (red App. 15-17); that the federal regulations (of March 7, 1959) are invalid; that the regulation permits a discrimination not permitted under the White Act and conflicts with the Constitution of Alaska, and that plaintiffs have no property right in a fish-trap location. The District Judge dismissed the complaints, relying upon the "equal footing" doctrine.

This Court, in its decision directing appellants to perfect their appeal to the Supreme Court of Alaska, indicated as its reasons for the direction, "While we have before us questions of federal law that are the concern of this Court, their consideration implicates antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State, upon which it would be patently desirable to have the enlightenment which the now fully formed Alaska Supreme Court presumably could furnish." 363 U.S. at p. 561. It sought enlightenment specifically upon "the status of these two Indian communities in relation to the authority of the Secretary of the Interior" and "justification of this legislation under the so-called police power." 363 U.S. at p. 562. It also noted that if 95 SLA 1959, Sec. 1, should be construed to exempt Indians from the prohibition against fish traps, "a constitutional question now appearing on the horizon might disappear." p. 562.

In attempting to supply this Court with the specific information requested in its opinion (363 U.S. at p. 561), the Supreme Court of Alaska had before it only the earlier rec-

ord as printed for this Court—substantially only the complaint and motion to dismiss which admitted the allegations of the complaint. Since apparently the court below felt it required additional facts, it might have remanded the case to the trial court for the taking of additional testimony. Instead, it chose to fill out the record largely by mere *ex cathedra* assertions, thus depriving appellants of any opportunity to cross-examine or offer evidence refuting the statements made. Much that was asserted is not only unsupported, but is contrary to fact; and if these matters were within the judicial knowledge of the court below, then they are within the judicial knowledge of this Court; and we will ask this Court to hold them correctly.⁷

The court below argued (1) that because the waiver of jurisdiction in the enabling Act was not a fulfillment of the waiver of jurisdiction offered in the Alaska Constitution, it was not “accepted” by Congress and so did not become the “solemn compact” referred to and even was of no force and effect as to fishing rights, leaving the State a clear field to regulate Indian fishing rights whatever their nature (Opinion 17a—20a, 25a); (2) that the section of the Alaska Omnibus Act clarifying the jurisdiction of the United States over such fishing rights is not binding upon the State of Alaska because it was not part of the compact (Opinion 20a); (3) that the Indians held no fishing rights to be protected (Opinion 21a-25a); (4) that the State in the proper exercise of its police power must have authority to regulate

⁷ Whatever is law or fact in a state court below is similarly law or fact here, and this Court takes judicial notice to the same extent as the court below—without which, of course, it could not truly review the court below. See *Hanley v. Donoghue*, 116 U.S. 1, 6-7. This Court reviews the record in state-court cases to the extent necessary to vindicate a claimed federal right. *Southern Pac. Co. v. Schuyler*, 227 U.S. 601, 611. “State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact.” *Williams v. North Carolina*, 325 U.S. 326, 236.

native fishing (Opinion 25a-29a); (5) that Section 4 of the Statehood Act violates the equal-footing doctrine (Opinion 30a); (6) that appellants have no relationship with the federal government warranting the special protection of Section 4 of the Statehood Act (Opinion 34a-40a); (7) that the language in 95 SLA 1959 had the single purpose of lulling the Secretary of the Interior ("to preserve or restore administrative harmony at a critical period") into the feeling that there was no conflict between the State and the Territory in the interpretation of Section 4 of the Alaska Statehood Act for the purpose of obtaining the Secretary's certificate that the State was ready to undertake its own fish and wildlife regulation (Opinion 47a); and (8) that permitting the fish traps is a denial of "equal footing" on the ground of the new state's ownership of navigable waters and submerged lands (Opinion 48a-54a).

The Department of the Interior has continued to assert its jurisdiction over appellants' fishing rights. On June 2, 1960, 25 F.R. 4865, pursuant to notice of April 9, 1960, 25 F.R. 3079,⁸ the Secretary of the Interior promulgated semi-permanent regulations as Part 88, 25 C.F.R. subchap. (H), implementing 25 U.S.C. §§ 2 and 9, 5 U.S.C. § 485 and Section 4 of the Statehood Act. The regulation specifically authorizes the use of fish traps by appellants. It further provides that: "The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations." (Section 88.8, red App. 38). As a further step in implementing its policy of permitting appellants to continue operation of fish traps, the Secretary of the Interior delegated his authority to enforce the regulations of the Depart-

⁸ The notice is printed pages 34-38 of the red Appendix. The regulation as adopted and incorporated into 25 C. F. R. Part 88 is not substantially different from the regulation as proposed.

ment of the Interior governing the commercial Indian fishing in Alaska to the Director of the Bureau of Commercial Fisheries,⁹ who, in turn, in line with his authority redelegated the duty to the Regional Director, Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.¹⁰

Summary of Argument

In this case this Court can no longer avoid the disagreeable duty of finding legislation unconstitutional—either an act of Congress or Alaska state legislation. Both Alaska and the United States claim jurisdiction—each to the exclusion of the other—to regulate the fishing of appellant Indians. The federal government claims that right by virtue of Sec. 4 of the Alaska Statehood Act, which reserves to the United States “absolute jurisdiction and control” of the fishing rights of Indians until Congress shall otherwise provide. Alaska asserts its own statutes regulating fishing, and says that the provisions of Sec. 4 of the Statehood Act are either invalid or ineffective for several reasons.

The court below holds Sec. 4 of the Statehood Act invalid because of the equal-footing doctrine—that is, Alaska must have the right to regulate its fish and game or the provision of Congress that it be admitted on an equal footing with other states is frustrated. The difficulty is that similar express reservations of federal authority and Indian right in connection with the admission acts of other states have been repeatedly upheld by this Court. The state also claims rights under its police power to regulate fishing by appellant Indians; but it is well established that where the state police power comes into conflict with powers exercised law-

⁹ Order of July 18, 1961 (26 F.R. 6628), Federal Register, July 25, 1961. App. post 33.

¹⁰ Order of July 26, 1961 (26 F.R. 7064), Federal Register, August 5, 1961. App. post 34.

fully by the federal government, the state police power must give way. The court below holds that the Alaska Constitution "offered" to disclaim Indian fishing rights only as those rights were "defined" in the act of admission, and that the act of admission did not specifically define the rights, so that there was no literal acceptance of the state's offer. But if a formal contract be necessary in these circumstances, it was effected pursuant to Sec. 8(b) of the Statehood Act, which required ratification of Sec. 4 by the people of the state and without which the entire act would have fallen.

The court below holds Sec. 4 ineffective. But Sec. 4, in reserving jurisdiction over Indian fishing, is not meaningless; Congress did not adopt it as mere idle ceremony; appellant Indians were fishing there at the time, and Congress reserved to its own jurisdiction the regulation of that fishing. The court below says there are not now and never have been Indians in Alaska as that term is used in federal Indian law; but the allegations of the complaint, uncontested affidavits, public records and notorious historical and ethnological fact all show beyond question that appellants are Indians quite as much as are Indians elsewhere. The court below holds that appellants had no right or title in their fishing. But these Indians were fishing when the Statehood Act was passed and they had always fished, from time immemorial. The small remnant of their aboriginal fishing rights is nonetheless a *right* protected by federal law whether or not it is recognized by formal treaty or agreement with the particular tribe. These fishing rights have been recognized for many years by the Department of the Interior; and its efforts in that respect ultimately led to Sec. 4 of the Statehood Act now before the Court.

Accordingly, Sec. 4 of the Statehood Act validly reserves jurisdiction in the federal government, and the state's acts

conflicting with that jurisdiction must fall under the Supremacy Clause—although they would also fall under the contract-impairments clause, since the compact between the federal government and the people of the state pursuant to Secs. 4 and 8(b) of the Statehood Act actually is a contract protected against state impairment.

ARGUMENT

I. Section 4 of the Statehood Act Is Valid and Effective

A. Section 4 of the Statehood Act is Valid

1. Section 4 of the Statehood Act is Valid Notwithstanding the Equal-Footing Doctrine.—The court below holds (Opinion 49a, 53a) that to deny Alaska ownership of the soil beneath the navigable inland waters which are involved here would be violative of the equal-footing doctrine, as would be withholding sovereignty over the inland waters, citing *Pollard v. Hagan*, 3 How. 212, 228-229; *Shively v. Bowlby*, 152 U.S. 1, 26; and *United States v. Texas*, 339 U.S. 707, 716.

Pollard v. Hagan deals with the broad language of agreement under which the state was admitted. 3 How. at p. 223—

“When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, *except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States*, for the temporary purposes provided for in the deed of cession and the legislative Acts connected with it. *Nothing remained in the United States, according to the terms of the agreement, but the public lands.* And, if an express stipulation had been inserted in the agreement, granting the municipal

right of sovereignty and eminent domain in the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted." (Italics added.)

Yet here we have the express reservation of rights and jurisdiction in the United States where jurisdiction is independently sustained under the federal Constitution against the very contention of the *Pollard* case. *United States v. Sandoral*, 231 U.S. 28, 38 and cases cited. See also *Ex parte Webb*, 225 U.S. 663, 669-70. Similarly, *United States v. Holt State Bank*, 270 U.S. 49, cited by the court below, Opinion 48a, footnote 100, does not hold that the federal government *could* not have reserved the lake for the Indians, but only that it *did* not. To the contrary, it states that the federal government can create rights in tidelands and such rights are not cut off by statehood. pp. 54-5. *Shively v. Bowlby* and *United States v. Texas* merely typify the rule of the *Pollard* case that if the United States still owns them, the state upon admission takes title to the tidelands.

In addition to tidelands, the doctrine of the tidelands cases covers beds of lakes and navigable waterways. Yet, the reservation of Indian fishing rights and jurisdiction has been honored as to each. See *Seufert Bros. v. United States*, 249 U.S. 194, 198-9; *Tulee v. Washington*, 315 U.S. 681, 684-5. Thus, the tidelands cases do not support to any extent the unconstitutionality of Section 4 of the Statehood Act.

The court below (Opinion 30a-31a) places heavy reliance upon *Ward v. Race Horse*, 163 U.S. 504. That case was aberrant; and this Court has flatly held to the contrary in many cases since. That case held that Wyoming could punish an Indian for violating a state game statute in killing

seven elk off his reservation in reliance on a claimed treaty right to hunt on "unoccupied lands of the United States." Prior to *Ward v. Race Horse*, the reservation of lands to which Indians had had original title had been respected (*Gaines v. Nicholson*, 9 How. 356, 365); and following *Ward v. Race Horse*, the Court immediately returned to that earlier doctrine in *United States v. Winans*, 198 U.S. 371, 380-81, which held that although the white man felt he could make better use of the fishing right than the Indian,¹¹ the United States could create rights when it held the territory which would be binding upon the state after admission and that the rights conferred upon the Indians are not subordinate to the powers acquired by the state upon its admission into the Union upon an equal footing. This view has been consistently followed by this Court since, including further cases of state interference with Indian fishing. *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198-9; *Tulce v. Washington*, 315 U.S. 681, 684-5. Exclusions of state jurisdiction over Indians by admission acts have uniformly been sustained as well in other situations against contentions based on the equal-footing doctrine. *Dick v. United States*, 208 U.S. 340, 353; *Ex parte Webb*, 225 U.S. 663, 682, 690; *United States v. Sandoval*, 231 U.S. 28, 38, 45-46, 49.¹² For the equal footing doctrine is of no greater dignity than the Congressional power to regulate commerce with the Indian tribes. *Dick v. United States*, 208 U.S. at p. 353. In 1954 this Court declined an opportunity to review an opinion of the Supreme Court of Idaho commenting instructively on

¹¹ "It needs no argument to show that the superiority of a combined harvester over the ancient sickle neither increased nor decreased rights to the use of land held in common." p. 382.

¹² Counsel who had convinced the Court in *Ward v. Race Horse* by this time had ascended this Bench and wrote the opinion in the *Sandoval* case, leaving no doubt as to the power of the United States or the fact that such an exclusion in an admission act (New Mexico) did not offend equality with the other states.

the deviation in *Ward v. Race Horse*. *State v. Arthur*, cert. den. No. 552, O.T. 1953, 347 U.S. 937, denying review of 74 Ida. 251, 261 P.2d 135, 138-139.

At the same time, *Ward v. Race Horse* is distinguishable on its face. This Court specifically noted (163 U.S. at p. 506) that Wyoming was admitted on an equal footing with the original states in all respects whatever "but in this act there was no exception, as there had been in the territorial act, in favor of the Indians." The lack of reservation of rights of and jurisdiction over Indians was emphasized and reemphasized by the Court. p. 515. The distinction from the present case, with its express reservation of rights and jurisdiction, is plain.

2. The State Police Power Does Not Render Section 4 of the Statehood Act Invalid.—The court below based the control of fishing here exercised by Alaska on the police power. Opinion 25a 28a. The court rejected the contention that Section 4 of the Statehood Act could override the state exercise of police power—which means that the "absolute jurisdiction and control of the United States" over Indian fishing rights which was retained by Section 4 of the Statehood Act yields to the state police power, if the state court is correct.

Of course, the rule is precisely the reverse. While the state may have a police power, it may not exercise it if it collides with the federal Constitution or an act of Congress. "But where there is such a collision, the action of a State under its police power must give way by virtue of the Supremacy Clause." *Morris v. Jones*, 329 U.S. 545, 553. The rule was long ago stated succinctly in *Jacobson v. Massachusetts*, 197 U.S. 11, 25:

"A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General

Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

3. Section 4 of the Statehood Act Is Not Invalid as an Inadequate Acceptance of a Conditional Waiver in the State Constitution.—The Supreme Court of Alaska refers in terms of contract law to the compact between the state and the United States pursuant to Section 12 of Article XII of the Alaska Constitution and Section 4 of the Statehood Act, calling the constitutional disclaimer an "offer" and Section 4 of the Statehood Act a "response." Opinion 16a-17a. Since the state "offered" to disclaim property, including fishing rights, held by or for any Indian, Eskimo, or Aleut, or community thereof, "as that right or title is defined in the act of admission", it holds that Section 4 did not quite come up to the offer because it failed to define the right or title in the act of admission. Opinion 18a.

But if Section 4 of the Statehood Act in order to have vitality can be considered only as a contract with Alaska, that contract was plainly reached whether or not Section 4 accepted the state's "offer." For Section 8(b) of the Statehood Act specifically provided for a vote of the people of Alaska on the proposition whether the provisions of the Statehood Act "reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Alaska, are consented to fully by said State and its people." Red App. 8-9. If not "*fully consented to*", the Statehood Act was ineffective; Alaska could not be admitted. If consented to, "the proposed constitution of the proposed State of Alaska, ratified by the people at the election held on April 24, 1956, shall be deemed amended accordingly." Red App. 9. As the proclamation admitting the state shows (red App. 29), the people of Alaska by their

vote agreed to this exclusive federal jurisdiction; and if there were any infirmity as between Section 12 of Article XII of the Alaska Constitution and Section 4 of the Statehood Act, the compact was reached with Alaska through its people and their vote to accept Section 4.

B. Section 4 of the Statehood Act is Effective

1. Section 4 is Not Meaningless.—Section 4 says there “shall be and remain under the absolute jurisdiction and control of the United States” any “lands or other property (including fishing rights)” which may be held by or in trust for any Indians. The court below in effect holds this meaningless since “no fishing rights were held by or for natives at the time.” Opinion 25a.

The phrase “including fishing rights” received special consideration when the Statehood Act was under consideration. See H.Rept. No. 624, 85th Cong., 1st Sess., p. 31; S.Rept. No. 1163, 85th Cong., 1st Sess., at p. 47. Its inclusion had been questioned by the Department of Justice, so it cannot be said that this phrase was included by inadvertence. It was again considered in connection with the Alaska Omnibus Act. In an analogous situation of statutory construction, this Court said (*Mid-Northern Oil Co. v. Walker*, 268 U.S. 45, 48):

“It fairly cannot be supposed that Congress would indulge in the altogether idle ceremony of enacting a law to save rights which, being in no way challenged or affected, stood in no need of being saved.”

Neither can it be supposed that Congress would indulge in the altogether idle ceremony of enacting a law to save rights which did not exist. These Indians were fishing there at the time; both Congress and the incipient state knew it. The rights under which they were fishing were, then, plainly reserved to exclusive federal jurisdiction.

2. Appellants are "Indians" Subject to Regulation by Congress.—A main ploy of the court below to escape the reach of federal jurisdiction over appellants was an attempt to make it appear that there are no Indians in Alaska so that appellants are in no respect Indians. Thus, the court says (Opinion 34a) that "There are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law."

This flies squarely in the face of allegations of the complaints: "That said village is located in Kake, Alaska; that said corporation is a membership corporation whose membership is that of an entire village, presently numbering 400 people; that the members thereof are of the Tlingit Indian Tribe; . . ." S.R. 83. (Same allegation as to Angoon, S.R. 102; affidavits supporting S.R. 93, 116.) With this also is to be compared the language of the federal constitution and bylaws of the Organized Village of Kake handed up to the Court at the previous argument: "We, the Kake Indians of Alaska, an Indian band or tribe . . ." approved by the Secretary of the Interior November 17, 1947; similarly, the corporate charter of Kake: "Whereas, the Kake Indians of Alaska, an Indian band or tribe, seek to organize . . . [under the Indian Reorganization Act of 1934]." The Angoon charter refers to Indians having a common bond of residence in the neighborhood of Angoon.

The status of these Indians as tribal Indians is notorious ethnological fact anyway: *Tlingit & Haida Indians of Alaska v. United States*, — C. Cls. —, 177 F. Supp. 452 (Oct. 7, 1959). In Finding 25, p. 48 of the pamphlet opinion, the Court of Claims holds: "The following are the names of the modern communities where the Indians of the Tlingit tribes live: . . . 6. *Hutsnuwu* tribe: Angoon (located at the same place as the original village); . . . 8. *Kake* tribe: Kake (located at the same place as the original village) . . .

Angoon, Kake, . . . are the native villages." See the map which accompanies the findings, Pl. Ex. 169, at p. 455 of 177 F.Supp. Cf. Compilation of Material Relating to the Indians of the United States and the Territory of Alaska pursuant to H.Res. 66, 81st Cong., 2d Sess., June 13, 1950, Serial No. 30, pp. 20, 22—*e.g.*, p. 22, "Kake a Tlingit Indian Tribe located on Kupreanof Island in southern Alaska." To the same effect, H.Rept. No. 2503, 82d Cong., 2d Sess., pp. 621-2. See Swanton, *The Indian Tribes of North America*, Bur. Am. Ethnology Bull. 145 (1952), pp. 540-3. We may ask, as to this assertion of the court that there are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law whether, indeed, the United States has deluded itself in establishing at Juneau one of its ten major area offices of the Bureau of Indian affairs. See Congressional Directory, 87th Cong., 1st Sess. (April, 1961), p. 479.

The Supreme Court of Alaska also asserts, for instance, that "Neither the residents of Kake and Angoon nor their Tlingit ancestors have ever been treated as wards of the United States." (Opinion 36a). And, ". . . Congress has not historically exercised a fostering care over the communities of Kake and Angoon, nor over their Tlingit ancestors, nor in fact over any of the Indians of Alaska." (Opinion 38a). Now, it is true that these Indians were impoverished by the white man who had found them "industrious and prosperous, and the accumulation of surplus wealth was a basic feature of their economy", *Tlingit and Haida Indians of Alaska v. United States*, 177 F.Supp. 452, 456. But it is flatly not true that the United States regards these people in either fact or law as differing from other Indians in their special relationship to the federal government. Thus, the complaints allege that plaintiffs have been organized and chartered by the federal government, as we showed

just above; that the United States Department of Interior has authorized the institution of this suit and the retention of counsel (whose selection and compensation are subject to the approval of the Secretary of the Interior). S.R. 82-83, 102. The Secretary of the Interior has referred in this case to "the long-standing supervisory control exercised by the United States for the protection of the Indians, . . ." S.R. 85, 105, 132.

Title to appellants' canneries and even the Corps of Engineers' permits authorizing them to maintain fish traps is in the name of the United States as trustee for appellants. S.R. 83, 102, 133-37. It is unchallenged that "... the earnings of the Kake Cannery are handled under the supervision of the United States" (S.R. 94), and that "... the total indebtedness of Kake to the United States is presently \$781,872.33 [in 1959]." S.R. 99. We note also "That the present value of said properties is \$377,218.45" (S.R. 99)¹³ — which would seem to be fairly substantial "fostering care" which the court below says has not historically been exercised.¹⁴

While denying United States guardianship for the sake of trying to close up appellants' fisheries, Alaska is all too willing to accept funds under the Johnson-O'Malley Act of April 16, 1934, 48 Stat. 596, 25 U.S.C. § 452, for the education of children at Kake and Angoon by reason of their ward status in relation to the federal government. See letter of Hildegard Thompson, November 3, 1961, attached as an Appendix to this brief, *post* p. 35.¹⁴

The 1936 extension of the Indian Reorganization Act of 1934 to Alaska was not the federal government's first rec-

¹³ For similar facts relative to Angoon see S.R. 113-117.

¹⁴ Before the territory took over the schools at Kake and Angoon with the aid of federal funds available to local school districts for the education of Indians, the schools were owned and operated by the Alaska Native Service. See letter, *supra*, Appendix *post* 35.

ognition that it owed a special duty to the Tlingits as its wards. The 1867 Treaty by which the United States acquired Alaska from the Russians made provision that the uncivilized natives should be treated by the United States as it treated its own aborigines. (Art. III, red App. 1-2).

The Court of Claims in *Tlingit and Haida*, (177 F.Supp. 452 at 462) found that "The fact that the United States never attempted to make treaties with these Indians is not significant since shortly after the acquisition of Alaska from Russia in 1867, Congress enacted the Act of March 3, 1871, 16 Stat. 544, 566, prohibiting any further dealings with Indians by treaty." The handbook on *Federal Indian Law*, p. 936, offers an additional explanation: "This was primarily because the reasons which were responsible for treaty-making by the Federal Government with the American Indians were not present in Alaska, where there was plenty of land and little danger of serious hostilities."

In 1873, Sections 20 and 21 of the Trade and Intercourse Act, prohibiting liquor traffic in Indian country and with the Indians, were extended to include Alaska.¹⁵

Beginning in 1905 and continuing to the present day, Congress has appropriated funds earmarked for education of the natives of Alaska (Act of January 27, 1905, 33 Stat. 616, 619, Sec. 7), and such funds are still used by the Department of the Interior for the education of the Indians of Kake and Angoon. The 1905 Act made these Indians eligible to attend Indian Boarding Schools in the states.

The hunting and (fishing rights) of the Alaskan natives were generally recognized by Congress throughout the years. The Act of June 7, 1902, 32 Stat. 327, as amended by

¹⁵ Act of June 30, 1834, 4 Stat. 729, 732-33; Act of March 3, 1873, 17 Stat. 510, 530. Failure of the government to enforce the prohibition (*Fed. Indian Law*, p. 936) was not a denial of the need of these Indians for the protection contemplated, but merely another instance of the government's neglect of these distant wards.

the Act of May 11, 1908, 35 Stat. 102, made exceptions to the hunting laws on behalf of the natives and others for subsistence needs.¹⁶ This right to take animals, birds or game fish out of season when other food was not available was continued for the benefit of the natives, prospectors and travelers by Act of January 13, 1925, 43 Stat. 739, 744, § 10, 48 U.S.C. § 198, as amended February 14, 1931, 46 Stat. 1111, and Act of June 25, 1938, 52 Stat. 1169, 48 U.S.C. § 205. The Act of January 13, 1925, 43 Stat. 739, § 11, provided for exemption for natives or half-breeds who had not severed tribal relations from the resident hunting and trapping license. That explorers and sometimes settlers living among the natives were accorded these same privileges did not detract from the fact that the privileges were extended to the natives as natives and not as citizens of the territory. *United States v. Winans*, 198 U.S. 371, 381.

The government did not affirmatively create reservations at Kake and Angoon, though through the protections from interference it accorded by statute and regulation, it may be said negatively to have done so. The policy of Congress in a series of acts beginning in 1884 of protecting the lands of the natives in actual occupation had the effect of "reserving" to them their villages—at least their main villages as of 1884—which appellants still occupy.¹⁷ The 1936 Act extending the benefits of the Wheeler-Howard Act to Alaskan

¹⁶ "Nothing in this Act shall . . . prevent the killing of any game animal or bird for food or clothing by native Indians or by Eskimo or by miners, explorers, or travelers on a journey when in need of food . . ." Apparently the natives were not bound by the condition "when in need of food." Act of June 7, 1902, 32 Stat. 327, § 1. This was amended by Act of May 11, 1908, 35 Stat. 102, § 1, to read that "Nothing in this Act shall . . . prevent the killing of any game animal or bird for food or clothing at any time by natives, or by miners or explorers, when in need of food; . . ."

¹⁷ Act of May 17, 1884 (23 Stat. 24, 26, Sec. 8 (red App. 2-3)). Act of March 3, 1891, 26 Stat. 1095, 1100, Sec. 14. Cf. Act of May 14, 1898, 30 Stat. 409, 413, Sec. 10.

natives also provided a method for the Department of the Interior to enlarge these reservations.¹⁸ The one reservation in southeastern Alaska established under the 1935 Act was struck down on the grounds that the Secretary of the Interior had not conformed factually or procedurally with the terms of the law.¹⁹ The court did, however, assert that the Haida Indians involved were ward Indians, saying (p. 699): "... equality only awaits the emancipation of the Indian from wardship restriction." This failure and the extreme opposition that developed to the creation of any reservations in southeastern Alaska²⁰ put an end to any further efforts along that line.

Citizenship of appellants is irrelevant to their status as Indians subject to federal regulation. As the Court stated in *Winton v. Amos*, 255 U.S. 373, 391-92, "It is thoroughly established that Congress had plenary authority over the Indians and all their tribal relations and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and

¹⁸ Act of May 1, 1936, 49 Stat. 1250: "Sec. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use or occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 17 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said territory. . . ."

¹⁹ *United States v. Libby, McNeil & Libby*, 107 F.Supp. 697 (Alaska, 1952).

²⁰ In *United States v. Libby, McNeil & Libby*, *supra*, p. 699, the court said: "Viewing this controversy in historical perspective it is no exaggeration to say that nothing since the purchase of Alaska has engendered so much ill feeling and resentment as the Department's reservation policy and its encouragement of aboriginal claims." For several years thereafter, bills were introduced in Congress forbidding the creation of reservations in Alaska. See *e.g.* S.J. Res. 162, 80th Cong.; H.J. Res. 269, 80th Cong.; S. 363, 81st Cong.

it rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it." *Tiger v. Western Investment Co.*, 221 U.S. 286, 311-16; *Hallowell v. United States*, 221 U.S. 317, 324; *Creek County v. Seber*, 318 U.S. 705, 718.

3. Appellants Have "Rights" Referred to in Section 4 of the Statehood Act.—The Supreme Court of Alaska (Opinion 24a) stated that "Our search leads us to the belief that no act of Congress had established any 'right or title' in fishing rights which were 'held' by or for natives at the time the compact was made. Whatever hunting or fishing privileges Congress has extended to natives in the past have been equally applicable to the white residents . . . [Opinion 25a]. We are forced to conclude that no compact as to fishing rights was formed between the State of Alaska and the United States . . . This is because no fishing rights were defined, as required by the condition in the offer to disclaim, and no fishing rights were 'held' by or for natives at the time."

In the foregoing statement, the court apparently feels that rights in the natives have to be affirmatively created by act of Congress. This ignores that these Indians have rights which they have exercised since before the white man came to Alaska. The small remnant of these rights they seek here to protect. The fact that they have always been fishermen is recognized not merely by appellee but is shown by the recent case of *Tlingit and Haida Indians of Alaska v. United States*, — C. Cls. —, 177 F. Supp. 452, 456-457 (1959).

The rights are legal rights, not merely moral ones. From the outset of our national dealings with the Indians, the natives of this country have been "~~admitted to be~~ the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." *Johnson v. M'Intosh*,

8 Wheat. 543, 574 (1823). "Whether . . . a reservation . . . or unceded Indian country, . . . the Indians' **right** of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." *Minnesota v. Hitchcock*, 185 U.S. 373, 388-9 (1902). The Court has referred to the Indians' ". . . unquestioned **right** to the lands they occupy, until . . . extinguished by a voluntary cession to our government; . . ." *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831). "Indians have **rights** of occupancy . . . as sacred as the fee-simple, absolute title of the whites; . . ." (*id.*, p. 48). They have ". . . a **right** to all the lands within [their territorial] boundaries, which is not only acknowledged, but guaranteed by the United States" *Worcester v. Georgia*, 6 Pet. 515, 557 (1832). Indians hold lands ". . . **owning** them by a perpetual **right** of possession in the tribe . . . [which, though fee was in the crown] could not be taken without their consent . . . their **right** of occupancy is considered as sacred as the fee-simple of the whites." *Mitchel v. United States*, 9 Pet. 711, 745-746 (1835). The Court has spoken of their ". . . unquestionable **right** to the lands they occupy, until . . . extinguished by a voluntary cession. . . . This perpetual **right** of occupancy, with the correlative obligation of the government to enforce it. . . ." *Leavenworth Railroad v. United States*, 92 U.S. 733, 742 (1875). It has spoken of the ". . . **right** of Indians to their occupancy [which] is as sacred as that of the United States to the fee, . . ." *United States v. Cook*, 19 Wall. 591, 593 (1873). It has said that "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian **right** of occupancy . . ." *United States as Guardian, etc. v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941), and *Cramer v. United States*, 261 U.S. 219, 227 (1923). "It was the

usual policy not to coerce the surrender of lands without consent and without compensation. . . . Something more than sovereign grace prompted the obvious regard given to original Indian title." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 48 (1946).

The legal position of a tribe or a clan of Indians cannot well be understood without the realization that it constitutes a government—not merely aboriginally, but now—not with only property rights, but with governmental functions recognized by the Indian Reorganization Act (under which these appellants are organized, S.R. 82-83, 102) itself. But the fact that these are political entities, owing, when the white man first came to their country, no allegiance to the United States, has been the Achilles heel of the Indian tribes of this country.

Though their legal rights are plain beyond all cavil, they are governments; the dealings of the federal government with their legal rights is in the political field. No more than could the Russian Government on a trespass by the United States could the Indian tribes come to this country's courts for redress. The Indians could appeal only to the political branch, only to the political conscience of our country. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-566 (1903).

And when that conscience has heeded the natives' appeal, as has so frequently been the case with the legislative branch of our government (as distinguished from the executive, whose representatives so often have sided with the pioneer in his conflicts with the aborigine), the courts are freed from the political restraint and bound to protect the native's existing rights. While the student may express wonder that the courts call a violation of "unrecognized" title (as distinguished from land held pursuant to treaty or statute) a mere trespass as distinguished from a taking under the 5th Amendment entitling the aboriginal owner to

just compensation,²¹ and while the student may wonder why a treaty right may, under § 1505 of the Judicial Code (Appendix, *post*), collect just compensation immediately upon a taking, while the Indian-title right must await still further political permission from Congress,²² the fact that in any

²¹ For a *tortious* taking of private property for public use there is no right to just compensation under the Fifth Amendment. *United States v. Goltra*, 312 U.S. 203, 208 (1941). But a treaty title of Indians, despite the political bar to suit, gives the right (enforceable when Congress gives permission to sue) to just compensation under the Fifth Amendment. *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *United States v. Shoshone Tribe*, 304 U.S. 111, 115-116 (1938); 299 U.S. 476, 495-496 (1937). On the other hand, if the rights involved are aboriginal rights not politically recognized by the United States through treaty or statute—that is, which have not become a contract right of, or a guaranty by the United States to, the Indians, then a taking of title by the United States, and apparently with or without the authorization of Congress, is tortious and does not require just compensation under the Fifth Amendment, i.e., results in a judgment for only the value at time of taking, without any damages for delay in making payment. *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49. Note that the *Alcea* case cites the *Goltra* case (tortious taking) as authority for this distinction.

²² A taking of recognized Indian title—the contract right referred to in note 21, ²¹ just above—is one “arising under or growing out of any treaty, agreement or act of Congress.” *United States v. Creek Nation*, 295 U.S. 103, 108 (1935); *Shoshone Tribe v. United States*, 299 U.S. 476, 496 (1937); *Seminole Nation v. United States*, 102 C. Cls. 565 (1944). Therefore it comes under the express language of § 1505 of the Judicial Code (Appendix, *post*); the taking gives a right of immediate action for just compensation. Not so with Indian title which has not been recognized; while it affords the same basis for recovery if Congress waives the political bar and permits suit (first *Alcea*—*United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946); cf. second *Alcea*, above, n. 21) this Court squarely held that a tribe cannot recover for its taking under the language of § 1505 of the Judicial Code. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). While the latter decision is easy enough to understand as relating to a taking not “arising under the Constitution, laws or treaties of the United States,” since no treaty guaranteed the right that was taken, still the Court’s opinion is not instructive as to why the right is not a claim “which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group,” also embraced by that section; for if, as the cases indicate, the bar to suit is the political bar, then an Indian tribe just like any other property-owning corporation might have been thought entitled to sue for its property once that bar has been removed.

event there is a right furnishing adequate basis for judicial recognition is left undoubted by the cases.²³ And here that political conscience has heeded the appeal. In Section 4 of the Statehood Act Congress expressly required a disclaimer by Alaska not only of all right and title to property (including fishing rights) held by or for any Indians, but also an agreement that there is retained by the United States absolute jurisdiction and control of that property (including fishing rights). No matter how or when the United States might take the remaining fishing rights of appellants, or how or when or to what extent it might make compensation for their taking, the fact remains that the fisheries is a property right of appellants, and until and unless interfered with by Congress, Alaska is powerless to terminate it.

These fishing rights have been recognized for many years by the Department of the Interior.—In 1942, the Solicitor of the Department of the Interior handed down an opinion on the question: "Whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians under departmental regulations, and whether such rights require or justify the closing down of certain trap sites or the allocation of trap sites to Indian groups or other remedial action by the Secretary of the Interior." 57 I.D. 461. The question was answered in the affirmative, the Solicitor holding that the Alaska Indians had aboriginal possessory rights within the meaning of *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339. He found that whatever possessory rights the Alaskan Indians enjoyed in the waters of submerged lands were not impaired under Russian rule and were not divested by the United States, p. 464. He noted "in the first place, it must be recognized that the mere fact that the common

²³ First and second *Alcea*, discussed in notes 21 and 22 just above.

law does not recognize several rights of fishery in ocean waters or rights in land below the high water mark does not mean that such rights were abolished by the extension of American sovereignty over the waters in question. It is well settled that Indian legal relations, established by tribal laws or customs antedating American sovereignty are unaffected by the common law." Citing *Ex parte Tiger*, 2 Ind. T. 41, 47 S.W. 304 (1898), and *Delaware Indians v. Cherokee Nation*, 38 C. Cls. 234 (1903), modified 193 U.S. 127, as well as *Damon v. Hawaii*, 194 U.S. 154, and *Carter v. Hawaii*, 200 U.S. 255.

In discussing the effect of the White Act limitation against exclusive rights of fishery the Solicitor noted that it "clearly refers to grants under the statute and not to rights existing long prior to the statute." p. 468.²⁴

Until the decision of the Court of Claims in *Tlingit & Haida Indians v. United States*, 177 F. Supp. 452, the issue whether the natives of Alaska retained any aboriginal rights remained in doubt.²⁵

Notwithstanding the doubt, the Department of the Interior continued to assert and try to protect the fishing rights of the natives. See *Hynes v. Grimes Packing Co.*, 337 U.S. 86, *United States v. Libby, McNeill & Libby*, 107 F. Supp. 697 (D. Alaska, 1952). It sponsored legislation which would have caused the commercial canneries to give up trap sites within the aboriginal areas of the various clans to those clans or villages. S. 1446, H.R. 3859, 80th

²⁴ *Hynes v. Grimes Packing Co.*, 337 U.S. 86, which has been cited to the contrary, when carefully read stands only for the proposition that White Act sanctions could not be used to protect such pre-existing rights. As a matter of fact, *Hynes v. Grimes* held that the Secretary of the Interior could reserve waters to the Indians irrespective of the pre-existing rights, but that the reservation could not be protected by White Act sanctions.

²⁵ *Miller v. United States*, 159 F. 2d 997, 1002. The court in *Tlingit and Haida* found the rights exist. p. 464.

Cong. Approaching the problem differently, the Department, in March, 1948, aided Angoon in the acquisition of the cannery to which the trap sites in its aboriginal area were connected (S.R. 102, 103) and in 1950 did the same for Kake (S.R. 83.)

That policy was continued with the insertion into the Statehood Act, Sec. 4, of the parenthetical phrase "fishing rights". And Congress was assured by the Secretary of the Interior that "the Bureau of Indian Affairs of the Department of the Interior will continue its trusteeship for these [Indians, Eskimos and Aleuts] natives after statehood." Hearings on S.49, 85th Cong., Committee on Interior and Insular Affairs of the Senate, p. 101.

II. Alaska Law Regulating Appellants' Fishing Must Yield to Section 4 of the Statehood Act

Federal regulations say that appellants may fish some of their trapsites. Alaska law says they may not fish any of them. One or the other must yield.

Section 4 of the Statehood Act says that fishing rights of Indians shall be "under the absolute jurisdiction and control of the United States until disposed of under its authority". Unless this Court shall hold that provision unconstitutional, then, under the Supremacy Clause, the state law must yield. Cf. *Irvine v. Marshall*, 20 How. 558, 562-63 (1857). And it has been repeatedly held that the reservation to Indians of rights such as these is perfectly valid and within the power of Congress. We reviewed the cases in discussing the equal-footing doctrine; see *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198-99 (1919); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Dick v. United States*, 208 U.S. 340, 358 (1908); *Ex parte Webb*,

225 U.S. 663, 682, 690 (1912); *United States v. Sandoral*, 231 U.S. 28, 38, 45-6, 49.

The Supremacy Clause aside, the hostile state legislation would fall as an attempt to impair the obligations of contract—the contract being the compact entered into between the United States in Section 4 of the Statehood Act and the people of Alaska through their express vote pursuant to Section 8(b) of the Statehood Act. *Green v. Biddell*, 8 Wheat. 1, 92-93 (1823); *The Kansas Indians* 5 Wall. 737, 751, *et seq.* (1866), as reviewed in *Coyle v. Smith*, 221 U.S. 559 at pp. 578-79.

Conclusion

The judgment should be reversed and, pursuant to Section 14 of the Statehood Act (red App., p. 12) and Article XV, Section 17 of the Alaska Constitution (red. App., p. 20), the case should be remanded to the Supreme Court of Alaska.

Respectfully submitted,

JOHN W. CRAGUN,
Counsel for Appellants in No. 3.

FRANCES L. HORN,
WILKINSON, CRAGUN & BARKER,
Of Counsel.

APPENDIX

Sec. 1505 of the Judicial Code (28 U.S.C. § 1505) was derived from § 24 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. 1049, 1055), according the first general authority to Indian tribes to sue the United States on such of their claims as might arise after the date of that act. In its present form it was adopted with the Judicial Code of 1949, and reads:

§ 1505. Indian claims

The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group.

26 F. Reg. 6628, July 25, 1961

Fish and Wildlife Service

DIRECTOR, BUREAU OF COMMERCIAL FISHERIES

**Commercial Indian Fishing in Alaska ; Notice of Delegation
of Authority To Enforce Regulations**

SECTION 1. *Delegation.* The Director of the Bureau of Commercial Fisheries is authorized, subject to the provisions of section 2 of this order, to exercise the authority delegated by the Secretary of the Interior in Secretary's Order No. 2857 to enforce the regulations of the Department of the Interior governing the commercial Indian fishing in Alaska set forth in 25 CFR Part 88, in those areas in the State of Alaska in which he is requested to do so by the Commissioner of Indian Affairs.

SEC. 2. *Redelegation.* The authority delegated by section 1 of this Order may be redelegated in writing to the Regional Director, Region 5 of the Bureau of Commercial Fisheries. The redelegation of this authority shall be published in the FEDERAL REGISTER.

Dated at Washington, D.C., July 18, 1961.

CLARENCE F. PAUTZKE,
Commissioner of Fish and Wildlife.

26 F. Reg. 7064, August 5, 1961

Fish and Wildlife Service

COMMERCIAL INDIAN FISHING IN ALASKA

**Notice of Delegation of Authority to Region 5 Director to
Enforce Regulations**

The regulations issued herein are based on authority of the Director, Bureau of Commercial Fisheries, to issue such regulations. The requirements herein set forth apply as a portion of the directives system of the Bureau. Such material follows the format of the Bureau's Manual and is to be included therein.

SERIES 5000—RESOURCE DEVELOPMENT

5491. *Commercial Indian Fishing in Alaska.*

549.1. *Delegation of Authority.* The authority included in the FEDERAL REGISTER of July 25, 1961 to enforce regulations for commercial Indian fishing in Alaska, is hereby delegated to the Regional Director, Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.

Dated at Washington, D.C., July 26, 1961.

DONALD L. MCKERNAN,
Director,
Bureau of Commercial Fisheries.

UNITED STATES DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Washington 25, D.C.

November 3, 1961.

Wilkinson, Cragun, and Barker,
1616 H Street, N.W.,
Washington, D. C.

GENTLEMEN:

We are pleased to provide you the information requested by telephone November 1, 1961, concerning Johnson-O'Malley Act assistance to the public school system at Kake and Angoon, Alaska.

Both schools were constructed for education of native children, Kake in 1891 and Angoon in 1920. Both were operated by the Federal Government until their transfer to State jurisdiction. According to our records the facilities at Kake were transferred under a Use Permit No. 41-14 effective July 1, 1947. Johnson-O'Malley Act assistance was furnished the district beginning in 1960 to enable the school district to develop high school grades. The funds are provided under the State Johnson-O'Malley Act contract.

The independent school district at Angoon, Alaska, took over the operation of the Federal school at the beginning of the school term in 1954. Johnson-O'Malley Act assistance has been furnished the district each year since that time in the absence of a local tax base to support local share of financing the public education program involving the native children. The contract was made directly with the school district until 1958 when this district was included in the Johnson-O'Malley Act plan developed with the Territory. This plan was approved later by State officials following Alaskan statehood.

If we can be of further assistance, please advise.

Sincerely yours,

HILDEGARD THOMPSON,
Acting Assistant Commissioner.

(9806-1)

CLERK
SUPREME COURT, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1961

No. 2

**METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS
RESERVE, a Federally Chartered Corporation, Appellant**

v.

**WILLIAM A. EGAN, Governor of the State of Alaska,
and THE STATE OF ALASKA, Appellees**

On Appeal from the Supreme Court for the State of Alaska

REPLY BRIEF FOR APPELLANT

**RICHARD SCHIFTER
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Attorneys for Appellant**

Of Counsel:

**ALAN L. WURTZEL
STRASSER, SPINGELBERG, KAMPELMAN
& McLAUGHLIN**

December 12, 1961



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v.

**WILLIAM A. EGAN, Governor of the State of Alaska,
and THE STATE OF ALASKA, *Appellees***

On Appeal from the Supreme Court for the State of Alaska

REPLY BRIEF FOR APPELLANT

One week prior to the second oral argument of this case in the Supreme Court of the United States, the State of Alaska has filed a brief in which it concedes on most of the arguments which it has strenuously advanced against Metlakatla throughout the long course of this litigation and in which it, in effect, repudiates the decision of its own Supreme Court.

In its brief before this Court the State has now agreed:

- (1) that Congress had the power to establish the Metlakatla Reservation and that the Act of 1891 is, therefore, valid (see Alaska Br. 39);
- (2) that the Reservation could and did continue to exist past the time of Alaska's admission to the Union without violating the equal footing doctrine (see Alaska Br. 39, 44);¹ and
- (3) that the Metlakatla fishing right established under the 1891 Act "can reasonably be termed a 'native fishing right' within the meaning of Sec. 4 of the Statehood Act" and has thus been explicitly preserved by the Statehood Act (see Alaska Br. 39).

Having retreated so far, the State's sole remaining argument is that Metlakatla's fishing right, namely an exclusive fishing reserve, is subject to State regulation. The State's regulatory power, under this new theory, does not arise out of any Constitutional inhibition on the Federal Government to exclude State regulation, for appellees admit that "[i]t is clearly within the power of the Federal Government to create Indian reservations within a state or territory which will be free from all local regulatory authority". Alaska Br. 39. What appellees now suggest is that Congress has acted to permit such regulation. Alaska Br. 41, 45.

It is respectfully submitted that the State's new legal position is as much without merit as its old one

¹ Of the Alaska Supreme Court's holding to the contrary, appellees now say: "It is not necessary to draw such a forceful conclusion". Alaska Br. 44.

was. Significantly, appellees' brief does not cite or discuss any specific Congressional action which might tend to bolster its contentions. Instead it speaks vaguely of the "decision of the federal authorities . . . to have the fishing within the reserve regulated under a uniform system of regulation". Alaska Br. 45. Where, how and by whom this "decision" was made is not specified.

Appellees' inability to point to any specific action of Congress to support its contention that the Metlakatla fishery is now under State regulation is, of course, due to the fact that there is none. The fact is that Congress took the very opposite position. In the statutes which created and preserved Metlakatla's rights, Congress most emphatically reserved to the Federal government the power of regulation. None of these relevant provisions of law, it should be noted, are discussed in appellees' brief. Indeed, appellees have studiously avoided mention of the regulatory clauses in three crucial statutes:

- (1) The Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. 358, which sets apart the Annette Islands for the Metlakatians

"to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

- (2) The Act granting Alaska jurisdiction over crimes committed on Indian Reservations, Pub. L. 280, 83rd Cong. 67 Stat. 588, as amended, 72 Stat. 545, 18 U.S.C. 1162(a), which provides that

"Nothing in this section shall . . . deprive any Indian . . . community of any right, privilege,

or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."²

- (3) Section 4, Alaska Statehood Act, 72 Stat. 339, which provides that native rights (including fishing rights)

"shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority. . . ."

Rather than attempting to explain these specific reservations of Federal regulatory authority, appellees speak vaguely of an allegedly traditional Congressional policy of effecting a "uniform scheme of fisheries regulation." Alaska Br. 42. Closer scrutiny of the relevant background reveals that this "policy" is based upon nothing more than the historical accident that (1) during the period of Alaska's Territorial status responsibility for non-Indian fishing in the area was vested in the Federal rather than the Territorial government, and (2) the Federal government is the authority which traditionally controls all Indian fishing rights. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268. As power was thus fused, a single sovereign controlled all of Alaska's fishery during the Territorial period. But that never meant that complete uniformity was established. As Cohen points out "[i]n many conservation statutes the [Alaska] natives are given special privileges". *Id.* 408. See also discussion of

² This statute has been held to continue the prohibition of State regulation of Indian hunting and fishing on Indian Reservations to which the provisions of Public Law 280, 83rd Cong. have been extended. *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore., 1956).

Alaska native hunting and fishing rights in *COHEN*,
op. cit. 407-409.

If Congress had wanted to accomplish what appellees suggest, namely to protect the Metlakatla Fishery Reserve against invasion by private fishermen but permit the entry of the State for purposes of regulation, it would have done so through the Alaska Statehood Act. Yet neither the wording of that statute nor its legislative history support such a theory.

If all that Congress had intended to do with regard to Metlakatla is preserve the exclusive character of the Reserve, it would surely not have reserved to itself the sweeping and all-encompassing powers which the phrase "absolute jurisdiction and control" implies. That phrase, it must be remembered, was previously used in the Indian disclaimer clauses of other Statehood Acts. These clauses have invariably been held to exclude State jurisdiction. See Metlakatla Br. 50-51. When Congress included the traditional Indian disclaimer clause in the Statehood Act and explicitly added the term "fishing rights," it undoubtedly recognized that the State could easily regulate a fishing right out of existence and that the natives were thus in need of protection against State regulation.³

³ Just as the anti-fishtrap regulation would destroy Metlakatla's cannery, unrealistic opening and closing dates set under Alaska regulations could destroy all of Metlakatla's fishing. The Secretary of the Interior was well aware of this possibility when he adopted Alaska's opening and closing dates as part of his own regulations. With regard to the Clarence Strait District, which includes the Metlakatla Reserve, he stipulated that its opening and closing dates must harmonize with those in the General Section of the Southern District. 25 C.F.R. § 88.2(d). Thus Metlakatla cannot be singled out by the State for punitive restrictions.

Nor does the legislative history of the Statehood Act leave any doubt about the intent of Congress to exclude State regulation. Congress has made it wholly clear that the purpose of Section 4 is

“to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state” (H.R. REP. No. 1731, 80th Cong. 2d Sess. 31 (1948));

to “except” from transfer to the State those “fisheries and wildlife . . . which are . . . included within the reserved native rights” (S.REP. No. 1929, 81st Cong., 2d Sess. 1-2 (1950));

“to maintain unimpaired the authority of Congress over the *use and disposition* of native property in Alaska”; (H.R. REP. No. 255, 81st Cong., 1st Sess. 13 (1949)) (emphasis supplied); and

to emphasize that “[t]he right of the Federal Government *to legislate with respect to natives* is not impaired by the bill and cannot be impaired by the State Constitution.” S.REP. 315, 82nd Cong., 1st Sess. 2 (1951) (emphasis supplied).

The wording of Section 4 and its predecessors, it must be noted, was hammered out against the background of strong pressure by Indians and Indian-interest organizations for the full protection of native rights. On June 9, 1950, Oliver LaFarge, President of the Association on American Indian Affairs, wrote to Senator Joseph C. O'Mahoney, then Chairman of the Senate Committee on Interior and Insular Affairs:

“Alaska is our last frontier. There is serious danger, unless the nation take steps to prevent it, that Alaskan frontier development may involve the despoliation of the native and Indian people . . .

The United States must require that Alaska pledge its respect for these commitments of the

nation in the legislation under which Alaska seeks to enter the Union. Such an expressed commitment would merely confirm existent rights; it would not change them. But the absence of that pledge would be an open invitation to Alaska to disregard the rights of its many thousands of Indians, Aleut, and Eskimo citizens." See Appendix B, pp. 2a-3a.⁴

That such pleas did not go unheeded is demonstrated by the subsequent comment of Senator Clinton P. Anderson, then a member of the Senate Committee on Interior and Insular Affairs and now its Chairman, in a letter to THE NEW YORK TIMES:

As one who participated in all of the exhaustive hearings and executive sessions which led to a virtual re-writing of the bill by the Committee, I can state categorically that no provision in the entire measure received greater attention, thought, and painstaking care than did the disclaimer clause from which I have just quoted. We had the able technical assistance of Indian experts from the Department of the Interior and the Department of Justice. Careful research was done on the language of similar disclaimer clauses in previous enabling acts and their interpretation by the Courts, as well as in the law and decisions with respect to Alaska. THE NEW YORK TIMES, Sunday, April 11, 1954, p. E 10.

Senator Anderson used the occasion to allude to certain political realities which the authors of the Statehood bill considered in drafting Section 4: "Most of the members of the Committee have strong Indian constituencies . . ." *Ibid.*

⁴ For additional evidence of Indian pressure on Congress in connection with native rights clauses in the Alaska Statehood Act see statement of Delegate Bartlett. 96 Cong. Rec. 11869-80 (1950).

When Congress thus acted to protect native rights against "the possibility of infringement by the new state", it knew of Metlakatla's fish traps (see 96 Cong. Rec. 11879 (1950)) and of Alaska's strong opposition thereto. See e.g., Testimony of Ernest Gruening in *Hearings Before Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs*, 85th Cong., 1st Sess. 306 (1957). It clearly acted with care and deliberation when it insisted that Indian fishing rights remain under the "absolute jurisdiction and control" of the United States.

Added support for appellant's interpretation of Section 4 can, of course, be found in the unequivocal action of the Secretary of the Interior, who has never waived in his interpretation of Section 4 of the Alaska Statehood Act as excluding State regulation of Indian fishing rights. The authorities for giving the Secretary's interpretation of the statute "considerable weight" are set forth in Metlakatla Br. 31-32.

In their brief, appellees seek to equate lack of State regulation of the Metlakatla fishery with lack of all regulation. Alaska Br. 43-44. They contend that Metlakatla cannot claim the right "to be free of regulation." *Id.* at 42. Metlakatla most certainly does not claim such a right. It has during the entire period since Alaska's accession to Statehood been under Federal regulation and has rigidly adhered to the conservation regulations promulgated by the Secretary of the Interior. These regulations do in fact follow closely the State of Alaska's scheme of regulation, 25 C.F.R. § 88.2 (a), departing from it only to allow a total of 11 Indian fish traps, *Id.* § 88.2 (e), and to safeguard Metlakatla's Reserve against discriminatory restric-

tions, § 88.2 (d).⁵ Competent authorities have asserted that properly regulated fish traps are no greater threat to sound conservation than seine boats and are in fact, far easier to police. See, e.g., Testimony of Warner W. Gardner, Assistant Secretary of the Interior, in *Hearings on S. 1446 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. 7 (1947).

Federal regulation has thus in no way prevented the execution of a comprehensive conservation scheme. The fact that two sovereigns collaborate in enforcing that scheme is in no way unusual. Salmon conservation on the Columbia River and its tributaries, for example, is the responsibility of the States of Oregon, Washington and Idaho. Migratory birds are protected by treaties between Canada and the United States. See *Missouri v. Holland*, 252 U.S. 416 (1920).

Cases such as *Ward v. Race Horse*, 163 U.S. 504 (1895), *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916), and *Tulee v. Washington*, 315 U.S. 681 (1942) have, as appellees correctly point out (Alaska Br. 43), no bearing on this case because they involve off-reservation hunting and fishing rights.⁶ In the instant case we are dealing with on-reservation Indian rights which have consistently been protected by the courts against State regulation. See *Klamath & Modoc Tribes v. Maison*, 139 F. Supp. 634 (D. Ore., 1956).

⁵ See Fn. 3, *supra*, p. 5.

⁶ The force of the *Race Horse* case has been substantially reduced by *United States v. Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919). See discussion of these cases in *State v. Arthur*, 74 Ida. 251, 261 P. 2d 135, 138-139, cert. den. 347 U.S. 937 (1954).

One added reason cited by the State in support of its contention that State regulation of the Metlakatla Fishery Reserve is permitted is that "[Metlakatla] is not, and has never been treated as what is normally termed an Indian reservation." Alaska Br. 44. Even if this statement as to the treatment of the Reserve were true, it would have no bearing on the applicable law, in view of the fact that Congress has, as has just been shown, explicitly reserved to itself jurisdiction over Indian fishing rights in Alaska. But the fact is that appellees' statement is not true. That statement as well as similar assertions in the opinions below⁷ are evidently founded on a lack of knowledge by the Alaska bench and bar of the true facts concerning Indian reservations in the lower 48 states.

Appellees and the Alaska courts seem to have fallen victim to certain romantic notions of Indian reservations, commonly held in the Eastern United States. Indians are pictured as still living wholly apart from the rest of the population, following their ancient traditions and perhaps even wearing aboriginal dress, preferably including war bonnets. Alaska's natives, appellees say, do not live that way, and are therefore "different".

The fact is that to anyone familiar with American Indian affairs, the Metlakatla Reservation will appear very similar to many of the reservations of the Western United States. As the Circuit Court of Appeals for the Ninth Circuit⁸ observed in *Alaska v. Annette Island*

⁷ See also *United States v. Booth*, 17 Alaska 561, 161 F. Supp. 269 (D. Alas., 1958).

⁸ That Court truly was in a position to make an expert comparison between Alaska Indians and other American Indians. As the ninth circuit then covered Arizona, Nevada, California,

Packing Co., 289 F. 671 (9th Cir., 1923), cert. den. 263 U.S. 708 (1923):

There can be no question therefore but that the Metlakahtla Indians are wards of the government. They are dwelling on the island at the sufferance of the government and on land which belongs to the United States. The purposes sought to be accomplished by the government are the same as its purposes for all Indian reservations, to encourage, assist, and protect the Indians in their efforts to acquire habits of industry, become self-supporting, and advance in the ways of civilized life. At 674.

That the Court of Appeals was fully justified in drawing this parallel and would be even more justified if it drew it today can be demonstrated by analysis of the points cited by appellees as distinguishing Alaska Indians from other American Indians. The fact is that there is nothing unique about the Alaska Indians' right to vote, see *Harrison v. Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948); *Trujillo v. Garley* (U.S. D.Ct. for D. N.M., Aug. 11, 1948, unreported), nor about their ability to be elected to high office.⁹ Nor is it unusual for an Indian reservation to contain a group of one particular ethnic stock joined with Indians of different ethnic origin,¹⁰ or to see a State authority grant welfare

Oregon, Washington, Idaho and Montana, about half of the Indian country of the lower 48 states was under the Court's judicial supervision.

⁹ A Rosebud Sioux, Benjamin Reifel, now represents the first district of South Dakota in the United States House of Representatives. CONGRESSIONAL DIRECTORY, 1961 Ed., 150-151. No one has suggested that this gives the State of Dakota the power to regulate Indian hunting on the Rosebud Sioux Reservation.

¹⁰ See e.g., 18 Stat. 28, 43 Stat. 246.

assistance to reservation Indians.¹¹ Furthermore, appellees' statement that Metlakatla has "no tribal organization" is based on the misconception that to be tribal an Indian governmental organization must still exist in its aboriginal form. That Indian communities have often taken on new governmental forms, organized not along aboriginal, ethnologically homogeneous lines but along modern, political ones is pointed out in COHEN, HANDBOOK OF FEDERAL INDIAN LAW 268, see also 126 ff. Finally, appellees' assertion that the schools in the area are furnished by the State is wholly misleading. The State of Alaska has never furnished schooling to the Metlakatla Indian Community except when Federally assisted. Like many other Western states it has assumed responsibility for the operation of Indian schools only after being assured of a Federal subsidy under the program for impacted-areas aid to education. See 20 U.S.C. 645. It has consistently received such a subsidy for the education of Metlakatla children for no other reason but that they lived on an Indian reservation. See Appendix C, p. 3a.¹²

CONCLUSION

As has heretofore been pointed out, the impact of Metlakatla's fish traps on the total economy of Alaska is insignificant. Yet to Metlakatla's economic existence they are vital. Congress and the Secretary of the Interior weighed the relevant economic factors and decided to continue Federal jurisdiction over Metlakatla's

¹¹ *Acosta v. San Diego County*, 272 P. 2d 92 (Cal. App., 1954).

¹² The annual Federal subsidy for Metlakatla children for the last three years has amounted to from \$443 to \$492 per child, sums which compare favorably with nation-wide norms.

rights. Appellant is here to ask this Court to protect the rights which the legislative and executive branches of the Federal government have granted it.

Respectfully submitted,

RICHARD SCHIFTER
THEODORE H. LITTLE
Attorneys for Appellant

Of Counsel:

ALAN L. WURTZEL
STRASSER, SPIEGELBERG, KAMPELMAN
& McLAUGHLIN

December 12, 1961



1a

APPENDIX B

COPY

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

**48 East 86th Street
New York 28, New York**

June 9, 1950

**The Honorable Joseph C. O'Mahoney
United States Senate
Washington, D. C.**

Dear Senator O'Mahoney:

It is our understanding that the Senate Committee on Interior and Insular Affairs plans to take final action on the Alaska Statehood Bill, H. R. 331, on Monday, June 12, or during that week.

The rights, and in fact the destiny, of the native and Indian people of Alaska are at stake in the Senate decisions to be made, since the Committee, according to its Print on this bill, is considering amendments which eliminate all guaranties of the property rights of these people.

It is our confirmed judgment that an Alaska Statehood Bill without such guaranties will put all native land rights in Alaska in jeopardy. The history of Indian land protection in the United States supports that view.

Prior to the policy of statehood guaranties of native rights, the fraud and violence committed against Indians on the American frontier became known as a "Century of Dishonor." Solemn Federal promises to respect Indian possessions were again and again violated or forgotten as soon as the Federal authority over territories was withdrawn. The State of Georgia openly defied the United States Supreme Court to carry out its decisions upholding Indian land rights in Georgia under Federal treaties. In other States, as, for example, in Kansas and Missouri, In-

dian restricted lands were rapidly alienated through forced sales to meet high state-imposed taxes. The United States Supreme Court later declared these taxes invalid, but the damage had been done. Indians of Georgia, Texas, Kansas, and Missouri, are still waiting for redress for wrongs suffered at the hands of those States in the 1830's and 1850's.

About 70 years ago, when the public conscience had been deeply aroused, Congress adopted a new policy to ensure respect for Federal promises to our Indian tribes. It is now an honored American tradition that a new State, seeking admission to the Union, must pledge its respect for the land rights and all other rights of native communities within its borders. Every State admitted since the 1870's—Montana, North Dakota, South Dakota, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, and New Mexico—willingly gave that pledge. Hawaii offers a similar pledge today in another statehood bill now before the Senate Committee. These pledges have been honored, and the Indians in those states have had a measure of security in their lands and possessions unknown to their kinsmen in other areas in earlier years.

Alaska is our last frontier. There is serious danger, unless the nation takes steps to prevent it, that Alaskan frontier development may involve the despoliation of the native and Indian people. The United States guaranteed in the Russian Cession Treaty of 1867 that these natives and Indians would be protected in their property. In the First Alaskan Organic Act of May 17, 1884, Congress made the pledge more specific, and promised that within the Territory of Alaska all Indians and Eskimos would be protected "in the possession of any lands actually in their use or occupation or now claimed by them." This pledge was repeated and amplified in the Act of March 3, 1891 and the Alaska Act of May 1, 1936. The Supreme Court of the United States has confirmed these commitments and again and again, as in the recent Karluk case, which this

Association helped carry to a successful conclusion, has had to intervene to protect Alaskan native possessory rights.

The United States must require that Alaska pledge its respect for these commitments of the nation in the legislation under which Alaska seeks to enter the Union. Such an expressed commitment would merely confirm existent rights; it would not change them. But the absence of that pledge would be an open invitation to Alaska to disregard the rights of its many thousands of Indian, Aleut, and Eskimo citizens.

We feel sure all Americans of good will join us in appealing to you to require in the Alaska Statehood Bill now before you a strong pledge protecting the land rights of natives and Indians on our last frontier.

Sincerely yours,

OLIVER LA FARGE,
President

OLF/D

APPENDIX C

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION
WASHINGTON 25, D. C.

December 8, 1961

Mr. Richard Schifter
Room 300
1700 K Street, N. W.
Washington 6, D. C.

Dear Mr. Schifter:

This letter will provide the information you requested by telephone on December 7, 1961, regarding Federal pay-

ment under Public Laws 874 and 815 to the State of Alaska for the children connected with the Annette Island Reserve located at Annette Island.

The organized school districts in Alaska each submit their applications and receive their Federal entitlement as provided under these two public laws. As you know, a large part of Alaska is unorganized territory and not in any school district. For the purposes of Public Laws 815 and 874, the entire unorganized territory is considered as one school district administered by the State Department of Education acting in the nature of a local school board. The State Department of Education prepares the application under each law listing all of the Federal properties located in the unorganized territory and the children connected with each property. The Federal entitlement under this over-all project is paid to the State Department and used by it together with other State and local funds to finance the operations of public schools located in the unorganized territory.

Applications submitted under Public Law 874 must list each Federal property claimed as a basis for Federal entitlement and the number of school children on each Federal property and also the number who live in a taxable home with a parent employed on each Federal property. The Federal entitlement, however, is computed on the basis of the average daily attendance during the school year of all federally connected children in the school district. It is not computed separately for the children connected with each property. Thus, the Federal entitlement a school district receives for children connected with one Federal property when it claims more than one property as the basis for its Federal entitlement must be on a derived or estimated basis. We have estimated the Federal entitlement paid to the State of Alaska for the children who live on the Annette Island Reserve in the following manner: Determined the percent that the number of children living

on Annette Island Reserve is of the total number of children living on Federal property claimed by the Alaska State Department of Education under the project application each year. This percentage, then, is applied to the total entitlement paid this school district for all children claimed in the application who live on Federal property.

The figures presented below show the total entitlement to the State Department of Education for the unorganized territory application for the years 1959-60-61 (fiscal years) and the estimated amount of that entitlement attributable to the children residing on Annette Island Reserve. In 1959 a total of \$3,500,466.57 was paid to the State of Alaska under this application. The 300 school children who lived on Annette Island Reserve were .0299% of the 10,010 children living on Federal property in the unorganized territory. This yields an estimated entitlement for the average daily attendance of these 300 children of \$104,663.64 at a rate of \$443.49 per child. In 1960 a total of \$4,217,936.88 was paid to the State of Alaska and the 244 children living on the Annette Island Reserve were .0231% of the 10,542 children living on Federal property in the unorganized territory. This yielded an estimated entitlement for these children of \$97,610.04 at a rate of \$492.98 per child. In 1961 the entitlement paid to the State of Alaska for this purpose was \$4,972,488.36 and the 246 children on the Reserve constituted .018% of the 13,616 children living on Federal property in the unorganized territory. This yielded an estimated entitlement for the Annette Island Reserve children of \$89,045.40 at a rate of \$468.66 per child.

In 1957 the Alaska State Department of Education allocated part of the entitlement it received under Public Law 815 for increases in federally connected children in the unorganized territory for the period June 30, 1956 to June 30, 1958 to construct a six classroom school building with necessary auxiliary facilities on Annette Island at a cost

6a

in Federal funds of \$298,472. Nonfederal funds provided the equipment for this building.

I hope this information will be helpful to you.

Sincerely yours,

B. ALDEN LILLYWHITE

B. Alden Lillywhite

*Associate Director for
Federally Affected Areas*

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IN THE
Supreme Court of the United States
October Term, 1912

No. 3

Charles Tamm of Texas, and James
C. Tamm, Attorneys,

vs.
Thomas A. Tamm, Governor of Texas, Appellee.

On Application for a writ of Habeas Corpus

under the writ of Habeas Corpus

For the purpose of
obtaining a writ of
Habeas Corpus
under the writ of
Habeas Corpus

Filed for
Thomas A. Tamm,
Appellee.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 3

ORGANIZED VILLAGE OF KAKE, AND ANGOON
COMMUNITY ASSOCIATION, *Appellants,*

v.

WILLIAM A. EGAN, GOVERNOR OF ALASKA, *Appellee.*

On Appeal from the Supreme Court of the State of Alaska

STATEMENT AS TO JURISDICTION

Appellants appeal from a decision of the Supreme Court of the State of Alaska handed down June 2, 1961, affirming the judgment of the District Court for the District of Alaska in Juneau, acting as an interim or

transitional state court, dismissing a claim for injunctive relief. This jurisdictional statement is submitted to show: (1) the Supreme Court has appellate jurisdiction, and (2) a substantial question is herewith presented under the rules of this Court.

THE OPINION BELOW

The opinion of the court below, rendered June 2, 1961, is reported in 362 P. 2d 901. A copy of said opinion is included in the separate Appendix filed on behalf of these appellants and also the Metlakatla Indian Community with whom the case was argued and decided below.

The case is already on the docket of this Court pursuant to a previous appeal from the transitional court. It is now Docket No. 3 (associated with No. 2, *Metlakatla Indian Community v. Egan*). The decision of this Court directing appellant to proceed with their appeal to the Supreme Court of Alaska, for clarification of certain issues, is reported in 363 U.S. 555. The opinion of Mr. Justice Brennan, as Circuit Justice, upon a temporary restraining order pending the previous appeal, is reported in 80 S. Ct. 33 and 4 L. ed. 2d 34. The opinion of Kelly, J. of the District Court for the District of Alaska appears in the printed record in Docket 2-3 and is reported in 174 F. Supp. 500. Supplemental findings of fact appear at pages 67-69 of the record of the previous appeal, No. 2-3.¹

¹ The record in Dkts. 326-327, O.T., 1959 (now Dkts. 2 and 3, O.T. 1961), in which an opinion of this Court has been rendered, 363 U.S. 555, served the Supreme Court of Alaska as the record in this case and has been designated as the major part of the record on appeal. This is the "printed record" referred to herein. S.R. refers to the supplemental record printed in that case.

JURISDICTION

1. The suit of the appellants is to enjoin the enforcement of certain Alaska criminal statutes (17 S.L.A. 1959, 95 S.L.A. 1959) on the grounds that the Alaska penal statutes, as to the appellants, are in conflict with federal statutes and regulations.

2. The Supreme Court of the State of Alaska entered judgment June 2, 1961, affirming the judgments of the court below in dismissing the suit for injunction. Notice of appeal was filed in the Supreme Court of the State of Alaska on July 25, 1961.

3. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. 1257(1) and (2). The Supreme Court also retains continuing jurisdiction in this case under its opinion 363 U.S. 555, pp. 561-562.

4. The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

Gully v. First Nat'l Bk., 299 U.S. 109;

Mallinckrodt Chemical Works v. Missouri, 238 U.S. 41;

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63;

Green Bay, etc. Canal Co. v. Patten Paper Co., 172 U.S. 58.

5. The provisions of the statutes, orders and proclamations involved are set forth in the red-covered Appendix to Brief of Kake and Angoon, No. 327, O.T., 1959. (No. 3 O.T. 1961). The citations are as follows:

Treaty with Russia, Mar. 30, 1867, 15 Stat. 539, 542, Art. III

Federal Statutes Involved

Revised Statutes, Provisions Common to All the Territories, 1874, § 1839

Alaska Civil Government Act, May 17, 1884, 23 Stat. 24, § 8 proviso

Title 48, United States Code, §§ 101, 112

Judicial Code, Title 28 U.S.C., §§ 1291, 1294

Alaska Statehood Act, July 7, 1958, 72 Stat. 339, §§ 1, 4, 6(e), 7, 8(a), (b), (c), (d), 12, 13, 14, 15, 16, 17, and 18.

Alaska Omnibus Act, June 25, 1959, 73 Stat. 141 §§ 2(a), (b)

White Act, June 6, 1924, as amended, 43 Stat. 464 (48 U.S.C. § 221 *et seq.*)

Constitution of Alaska, Art. IV, §§ 1, 2, and 3; Art. VIII, § 15; Art. XII, §§ 12 and 13; Art. XV, §§ 2, 4, 17, 24, and 25 and Ordinance No. 3.

Rules, Supreme Court of Alaska

Rule 7

Rule 53

Rule 54

Session Laws of Alaska, 1959

Chap. 17

Chap. 50

Chap. 95

Chap. 151

Proclamations of the President

Jan. 3, 1959, 24 F.R. 81, Admission Alaska

Interior Department

Release Apr. 7, 1960

[Proposed] Indian Fishing Regs., Alaska, 25 F.R. 3079, Apr. 9, 1960

Statement, All Fish Traps, Indian and non-Indian

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

1. Do Alaska statutes, to the extent they regulate or prohibit fishing by Indians with the use of traps, conflict with the express reservation to the United States of exclusive jurisdiction over property (including fishing rights) of Indians pursuant to Section 4 of the Statehood Act of Alaska, 72 Stat. 339, as amended by Section 2(a) of the Alaska Omnibus Act, 73 Stat. 141?

2. Is Section 4 of the Alaska Statehood Act inoperative for failure to comply with the conditions annexed to the offer of the people of Alaska in their constitution as to the terms and circumstances under which they abjure jurisdiction over Indian fishing?

3. Is the Alaska Statehood Act, Section 4, as amended, unconstitutional under the Federal Constitution for conflict with the equal-footing doctrine?

STATEMENT OF THE CASE

The State of Alaska and the United States (through regulations issued by the Secretary of the Interior) each assert jurisdiction, to the exclusion of the other, to regulate trap fishing by appellants.

Appellants, Village of Kake and Angoon Community Association, are each an Indian corporation chartered pursuant to the Indian Reorganization Act of 1934 (48 Stat. 984, 988, as amended, 49 Stat. 1250, § 17; 25 U.S.C. § 477); and each has as its membership an entire village of Thlinget Indians. S.R. 82-83, 102. The Village of Kake is located on the northwest side of Kupreanof Island, approximately 100 miles southwest of Juneau, Alaska, and that of Angoon is located on

the southwest side of Admiralty Island approximately 60 miles southwest of Juneau. Each of these appellants operates a fish cannery under the supervision of the Secretary of the Interior and with funds borrowed from the United States Government. S.R. 83, 103. The canneries were purchased with the active assistance of the United States Government through the Bureau of Indian Affairs of the Department of the Interior, and upon the advice of that Agency. Operation of traps is essential to the operation of the canneries at this time. Closing the canneries would wipe out the economic base of the members, leaving the villages with no means of self-support, the resulting damage extending to the very fiber of their social, economic and cultural well-being. S.R. 88-89, 108.

On July 7, 1958, Congress enacted the Alaska Statehood Act, 72 Stat. 339, under the terms of which the Alaska Constitution was ratified and affirmed. Under Section 4 of the Statehood Act, the State disclaimed all right and title to the land and property which Congress reserved to the control of the United States, namely, "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts. . . ." The third ordinance of the Constitution of Alaska abolished all use of fish traps in Alaska. Section 6(e) of the Statehood Act withheld control of the Alaska fish and wildlife from Alaska until the Secretary of the Interior certified the transfer. In November, 1958, the Secretary of the Interior announced his intention to abolish fish traps in Alaska with the exception of native-owned traps. On February 25, 1959, and April 17, 1959, the Legislature of Alaska enacted 17 S.L.A. 1959 and 95 S.L.A. 1959 making it a crime to erect, moor or maintain fish

traps on or over lands or tidelands owned by the State of Alaska. On March 7, 1959, the Secretary of the Interior issued regulations (24 F.R. 2053) prohibiting fish traps generally, but exempting from the prohibition native fish traps. Some traps of each of the appellants were designated for operation. S.R. 84-85, 104. The Secretary based this distinction in treatment of Indian and non-Indian traps on the disclaimer of Indian fishing rights made by the State and on the long-standing supervisory control exercised by the United States for the protection of the Indians. S.R. 85, 104-105.²

Notwithstanding appellants were thus authorized to operate, appellee (Governor Egan), both personally and by his agents, threatened appellants with seizure of their traps and criminal prosecution of the persons installing and maintaining them, and, on June 15, 1959, actually seized a trap which Kake had set out and arrested the President of the Kake Council and the foreman of the crew which set the trap. S.R. 86, 105-106.

HOW THE FEDERAL QUESTION IS PRESENTED

The complaints charged, among other things, that Section 4 of the Statehood Act and Article XII, Section 12, of the Constitution of Alaska, prevented the state from interfering with the control and management of Indian fishing rights held by the Indians or

² See letter to Alaska Area Director set out at length at S.R. 131-132. On the 2nd day of June, 1960, 25 F.R. 4864-6, the Secretary again issued regulations. The 1960 regulations are in their nature permanent, subject to modification from time to time by the Secretary of the Interior. On July 26, 1961, 26 F.R. 7064, delegation for the enforcement of these regulations was made to the Regional Director of Region 5, Bureau of Commercial Fisheries, Juneau, Alaska.

United States as trustee on their behalf; that the regulations allowing appellants to operate constituted an exercise by the United States of its exclusive powers over the fishing rights of Indians; that the regulation of Indians was exclusively in the United States; and that the state statutes were repugnant to the statutes and the commerce clause of the Constitution of the United States. S.R. 87-88, 106-107. A preliminary and a permanent injunction were prayed. S.R. 91-92, 110-111.

The Judge of the District Court in his opinion dismissing the complaint stated at the outset that the facts gave rise to a situation "where the exercise of claimed state power and authority collides with the exercise of claimed federal power and authority. . . ." R. 60. He resolved that conflict in favor of the state under the "equal-footing" doctrine, holding that the new state was deprived by the federal regulations of authority over its underlying navigable waters and of its "absolute right" to control the killing of game. He held that "the Secretary of the Interior is without authority to except the fish traps of the plaintiffs from his Order dated March 7, 1959, 24 Fed. Reg. 2053-71, prohibiting the use of fish traps in Alaskan waters effective April 18, 1959; and that the State of Alaska has authority to prohibit all fish traps in Alaskan waters, including those of the plaintiffs. . . ." R. 66.

On July 11, 1959, Mr. Justice Brennan, acting in his capacity as a Circuit Justice, granted appellants' application for an injunction pending final disposition of their future appeals to the United States Supreme Court (80 S. Ct. 33). On June 20, 1960, this Court handed down a decision affirming its own jurisdiction under 28 U.S.C. § 1257(2) "since the court below

sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution." 363 U.S. at p. 557. But inasmuch as the Alaska Supreme Court had not had the opportunity to pass upon certain antecedent questions of local law involved, the Court refrained at that stage from deciding the issues presented on the merits so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision. This Court noted "the original act prohibiting traps was amended by 95 S.L.A. 1959, § 1, so as to provide that it shall not be construed inconsistently with the compact, and if the Alaska court determines as a matter of statutory construction that the compact was designed to leave with the United States, as to Indian fishing, the power it exercises under the White Act, a constitutional question now appearing on the horizon might disappear." 363 U.S. at pp. 561-562.

The Supreme Court of the State of Alaska in its opinion interpreted 95 S.L.A., 1959, as not excepting Indian fishtraps from the operation of the act, App. pp. 46a-47a. The Alaska Supreme Court (App. pp. 34a *et seq.*) attempted to supply information suggested by this Court on the status of the Indian communities in relation to the authority of the Secretary of the Interior without reopening the record or according the parties any opportunity for hearing; and it supplied this information from sources wholly outside the record, contrary to the record, and to known fact and recognized authorities.³ The Supreme Court of Alaska

³ *E.g.*, the court stated "there are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law." App. p. 34a. See, however, *Tlingit & Haida Indians of Alaska v. United States*, C. Cls., 177 F. Supp. 452, describing in detail the Tlingit tribe and the lands aboriginally

also, at the request of this Court, addressed itself to the justification of this legislation under the police power concluding that the power withheld from the state under the proviso to regulate native fishing is a type which the federal government cannot withhold from the state under the equal-footing doctrine.

In addition to holding that Congress could not constitutionally limit the authority of the state to regulate native fishing, the opinion held Sec. 4 of the Statehood Act inoperative on the ground that it was not an "acceptance" of the "offer" made to the United States by Alaska in its constitution (Art. XII, § 12), and further construed Secs. 6(e) and 8(d) of the Alaska Statehood Act as indicating the intent of Congress to transfer control of all fishing, including native fishing, to the State of Alaska.

THE QUESTIONS ARE SUBSTANTIAL

The United States and the State of Alaska are in flat dispute over the regulation of Indian trap fishing.

The major argument of the Supreme Court of Alaska against the validity of the Secretary of the Interior's regulation of native fishing rights is that "the offer to disclaim by the State was conditioned on definition in the act of admission of the right or title to be disclaimed. The response merely repeated the offer to disclaim. It did not comply with the condition. . . ." (App. p. 18a). "We are forced to conclude that no

owned by its constituent clans one of which was the Kake Clan and one the Hutsnuwu, or Angoon Clan. The Court of Claims in its finding 25 noted that the Tlingit & Haida Indians presently live in a number of native villages which are almost entirely Indian; and that the Hutanu Tribe, Angoon, and the Kake Tribe are each located at the same place as their original villages.

compact as to fishing rights was formed between the State of Alaska and the United States. . . ." (App. p. 25a). So long as this argument stands, the validity of the entire Statehood Act insofar as it does not follow verbatim the Constitution of Alaska is in question.

There is a distinct conflict between the state and federal governments in the administration of Indian affairs in the State of Alaska. Both the Secretary of the Interior and the State Conservation Division are asserting jurisdiction over native fish traps. The state, while accepting federal Indian Service schools, health services, transportation facilities (App. 40a), and the liberal use of federal money for its native population, denies any relationship between the natives and the federal government. The effect of this decision, therefore, is much broader than the rights of appellants herein to maintain fish traps. It goes to the whole problem as between the state and the federal government as to which shall administer Indian affairs.

Section 4 of the Statehood Act is not violative of the equal-footing doctrine. As did the transitional court, the Supreme Court of Alaska based its arguments that the equal-footing doctrine is involved on *Ward v. Racehorse*, 163 U.S. 504. It dismissed contentions that *Ward v. Racehorse* is out of line with the Supreme Court's many decisions sustaining federal retention of jurisdiction over Indian fishing and hunting,⁴ and hoisted itself by its own bootstraps by equat-

⁴ *Gaines v. Nicholson*, 9 How. 356, 365; *United States v. Winans*, 198 U.S. 371, 380-381; *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198-9; *Tulee v. Washington*, 315 U.S. 681, 684-5; *Dick v. United States*, 208 U.S. 340, 353; *Ex parte Webb*, 225 U.S. 663, 682, 690; *United States v. Sandoval*, 231 U.S. 28, 38, 45-46, 49.

ing the instant case with *Racehorse* on the ground that Section 4 of the Statehood Act being of no effect (as construed by the court), "The act of admission contained no exception in favor or for the benefit of the Indians." App. 30a.

CONCLUSION

This Court should note probable jurisdiction.

Respectfully submitted,

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